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No. 84-571

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

ROBERT D. RAVEN
KATHLEEN V. FISHER
GORDON P. ERSPAMER
MICHAEL F. RAM
Morrison & Foerster
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 777-6000
Counsel for Appellees

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellants

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Volume II

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TABLE OF CONTENTS OF APPENDIX*

	Page
Relevant District Court Docket Entries	1
Complaint For Declaratory And Injunctive Relief, with Exhibits A through K, April 13, 1983.....	18
Memorandum Decision And Order denying defendants' motion to dismiss, October 21, 1983	97
Declarations and Affidavits:	
Declaration Of Walter R. Atlee, August 19, 1983...	122
Declaration Of Clarence William Autrey, September 24, 1983	126
Affidavit Of Ronald G. Bakal, March 30, 1983.....	129

*The district court opinion, Order Re Modification, Notice To All Veterans And V.A. Claimants Regarding Hiring Of Attorneys, Order Re Posting Of Notice, notice of appeal from the preliminary injunction, and notice of appeal from the order re modification were attached as appendices to the jurisdictional statement and are not reproduced herein.

Affidavit Of Mary Baluss, with attachments (Affidavit Of Emanuel Staub and Affidavit Of Harold J. Nussbaum), July 1, 1983 131
Declaration Of James L. Bianchi, April 12, 1983 ... 139
Declaration Of John Burke, November 10, 1983 142
Declaration Of Don E. Cordray, with Exhibit A, July 14, 1983 146
Supplemental Declaration Of Don E. Cordray, November 9, 1983 152
Affidavit Of Howard J. De Nike, April 28, 1983 155
Declaration Of Glenn Dorfmeier, July 15, 1983 158
Declaration Of Charles E. Joeckel, Jr., with attachment, November 16, 1983 160
Declaration Of R. Charles Johnson, March 29, 1983 ... 170
Declaration Of Frederico Juarbe, Jr., November 17, 1983 173
Declaration Of Thomas McBee, November 7, [1983] .. 178
Delcaration of Eldon D. Praiswater, November 10, 1983 181
Declaration Of Leonard W. Schroeter, April 11, 1983 184
Declaration Of Malcolm C. Souness, November 15, 1983 187
Declaration Of Richard D. Standefer, November 18, 1983 190
Declaration Of Ralph C. Vaughan, November 16, 1983 192
Declaration Of Reason F. Warehime, with Exhibits A and B, July 13, 1983 195
Declaration Of Doris J. Wilson, July 15, 1983 216

Depositions:

Excerpts from Deposition Of Wesley J. Hawke:
[Volume I], October 24, 1983 219
Volume II, November 3, 1983 226
Excerpts from Deposition Of Thomas H. Jacobson:

Volume I, October 21, 1983 253
Volume II, October 24, 1983 281
Volume III, November 2, 1983 297
Excerpts from Deposition Of Albert Maxwell, June 14, 1983 307
Excerpts from Deposition Of Richard B. Standefer:
Volume I, June 15, 1983 330
Volume II, June 16, 1983 345
Excerpts from Deposition Of Thomas A. Verrill:
Volume I. May 3, 1983 370
Volume II, May 6, 1983 386
Volume III, June 17, 1983 401
Volume IV, June 21, 1983 420
Volume V, July 8, 1983 430
Volume VI, July 11, 1983 434
Excerpts from Deposition Of Max R. Woodall:
Volume I, June 23, 1983 435
Volume II, June 24, 1983 464

Exhibits:

2—Form letter sent by Northern California Regional Office to unrepresented claimants who request hearings 507
4—Agent Orange Claims, November 1, 1982..... 509
9—New Adjudication Work-Rate Standards, effective October 1, 1981 510
17—Excerpts from Verrill's Personal Copy of V.A. Adjudication Manual-M21-1 511
46—Radiation Exposure Claims—Disposition At Regional Offices, March 1, 1983 515
47—Board Of Veterans Appeals Radiation Cases, October 22, 1981 516
48—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), First Quarter, Fiscal Year 1983, March 23, 1983 .. 517

49—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), Fiscal Year 1982, March 18, 1983 518
56—Board Of Veterans Appeals—Disposition of Appeals Involving Agent Orange, Fiscal Year 1982, March 18, 1983 519
57—Agent Orange Claims, March 1, 1983 520
58—Herbicide Exposure Claims, June 2, 1980 521
60—Appeals Statistical Data—Board Of Veterans Appeals, March 28, 1981 522
62—Don E. Cordray's VA Appeal Form 1-9 (Substantive Appeal) 523
63—Board Of Veterans Appeals—Disposition of Appeals by Type of Hearing, Fiscal Year 1982, January 11, 1983..... 525
64—Undated letter to Reasons Warehime from T.A. Verrill, VA Adjudication Officer, re: waiver of personnel hearing 526
65—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing In Fiscal Year 1982 527
66—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing in Fiscal Year 1977 528
67—Excerpt—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, 10/1/81-9/30/82 529
68—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, Fiscal Year 1977 530
69—Board of Veterans Appeals—Travel Boards Representation In Appealed Cases (includes Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976) 535
70—Excerpts from Chapter II, "The Special Legal Problems and Special Difficulties of Access of Veterans" of the Legal Services Corporation

Report To Congress On Access Of Veterans To Legal Assistance, with attachments 542
74—Excerpt—Average Length, In Minutes, Of Claimant Hearings Before the BVA 573
75—Board Of Veterans Appeals—Overall Representation (including Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976)..... 574
76—Disposition of Veteran Administration Claims On Appeal, 10/1/81—9/30/82, with Exh. L ... 582
77—Total BVA Cases in 1982 = 35,758, with Exh. J 584
78—BVA Representation In Appealed Cases, 10/80-9/81, with attachment 587
99—Excerpts from VARMS Report "PVAR25"—VA Data Processing Center Printout Re: Disposition by Reasons-Quarterly and Cumulative, May 5, 1983..... 589
101—Questions Presented from the Jurisdictional Statement in *Gendron* v. *Levi*, 423 U.S. 802 (1975) 598
115—Letter to Doris J. Wilson from Jack A. Collier, VFW Department Service Officer, re: Personal Hearing, May 26, 1982 599
124—Board Of Veterans Appeals—Informal Hearing Presentation, April 13, 1983 600
126—Excerpts from defendant's letter to Gordon Erspamer, re: supplemental response to plaintiff's first set of interrogatories, July 15, 1983 602
153—Statement Of Accredited Representative In Appealed Case (name withheld), re: Agent Orange, July 8, 1982 606
154—Statement In Support Of Claim (name withheld), re: PTSS Claim, December 9, 1981 .. 607
157—Statement In Support Of Claim (name withheld), re: Agent Orange Claim, July 15, 1981 608

173—VA letter to claimant (name withheld) denying claim for radiation exposure, August 28, 1978 609

177—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26489948), April 20, 1983 610

178—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26375945), February 23, 1972 611

180—Exhibits to Jacobson Deposition—Appointment Of Veterans Service Organization As Claimant's Representative, September 5, 1979 and Statement In Support Of Claim, June 30, 1975 re: Radiation (Claim File No. 26705288) 612

181—Exhibits to Jacobson Deposition—Statements In Support Of Claim, re: Radiation (Claim File No. 23396989), August 2, 1982 616

194—Exhibits to Jacobson Deposition—Letters to Dan Forest, Disabled American Veterans, December 5, 1980 and to M.H. Tallen, VA Adjudication Officer, December 12, 1980, re: withdrawal of Power of Attorney from DAV (Radiation—Claim File No. XC-5646292) ... 622

Miscellaneous:

Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction 625

Letter to Mylio S. Kraja, Executive Director of American Legion from John P. Murphy, VA General Counsel, introduced into evidence at 12/1/83 Hearing, re: Preliminary Injunction, September 27, 1983 628

Excerpts from Hearing Transcript, re: Preliminary Injunction, December 1, 1983 631

Order noting probable jurisdiction 634

VOLUME II
DEPOSITION OF THOMAS H. JACOBSON
October 24, 1983
(CAPTION OMITTED)

* * * * *

[144]

Q. And the evidence in the case has also established that a high percentage of claimants who, after initiating an appeal by filing a Notice of Disagreement, abandon an appeal before a substantive appeal is ever filed, in other words, between those two stages.

Has that also been your experience?

A. Yes. I send out a much larger number of Statements of the Case than I ever receive substantive appeals. Egotistically, I think this is because my arguments are persuasive.

Q. Your arguments in the Statement of the Case?

A. In the Statement of the Case and the law and the facts.

Oftentimes I think that when the veterans disagree, they don't understand why we decided what we did. And in the Statement of the Case, wherein we explain it, then they accept it and don't continue on with the appeal.

Occasionally we even had had a veteran write back in and say, "I agree with what you've said. I withdraw my appeal."

Q. Most of them abandon the appeal by merely failing to file a substantive appeal; is that correct?

A. That's correct.

Q. Then there would be a record purpose disallowance entered?

[145] A. Well, on the rating board we write the Statement of the Case, and the section chief sends it out to the claimant. And they have a computer system called VARMS, VA Appeals Records Maintenance.

An end product is taken when the Statement of the Case goes out. I think what they do is if he sends in his substantive appeal, then they reactivate the computer system for the control of appeals. If he never sends it in, I don't think anything else ever happens.

Q. Now, in preparing the Statement of the Case, you find, do you not, that your legal training is useful in summarizing the facts and the law?

A. Yes, I do. I went to law school for that purpose.

Q. In fact, your ability to prepare Statements of the Case has improved since you went to law school?

A. Yes, I think so. Also I have had a tremendous amount of experience over the number of years that I was going to law school. I went to law school four years at night and have done thousands of cases in each of those years.

* * * * *

[146] Q. I think in your earlier testimony you described three different types of specialists that are on a rating board—a legal specialist, an occupational specialist, and a medical specialist?

A. Yes, that's correct.

Q. Do all three of those specialists prepare statements of the case?

A. The medical specialist does not prepare Statements of the Case.

Q. Can you explain the reason for that?

A. The medical specialist is a doctor, and his primary knowledge is medicine. And although over the years they learn the laws that we operate under, they are not involved in the preparation and dictation of ratings or Statements of the Case.

They review them and sign them and give their opinions on the medical question.

Q. Now, in giving their opinions on medical questions, is there a requirement that those opionions be in writing?

A. No. The board members will ask the doctors, "doctor, we have these facts in this case. Will you look in [147] the folder and tell me what you think," that kind of thing. And then he tells them what he thinks about it, and then they go ahead and prepare the rating.

Q. Is there any requirement that the opinion given by the doctor verbally be placed in writing somewhere in the file?

A. Well, since he'll be signing the rating, he will be, in effect, stating that that's his opinion as to the medical facts.

Q. My question is, putting aside the fact that he signs the rating, is there any place in the file where you, the occupational specialist or the legal specialist, are required to place any verbal opinion given by a doctor in the file?

A. No, not by the rating board doctor.

Well, I might say in that regard that in a rating decision, or in a Statement of the Case, in the write-up part of the write-up may well include verbatim the doctor's opinion as to the medical facts in the case. I think that's what you're looking for.

Q. Well, what source would the person drafting the Statement of the Case turn to if there has been no written medical opinion in order to prepare the, quote, summary of the opinion?

A. When you write a Statement of the Case, theoretically you should be able to write the Statement of the Case from the rating that had been made denying the benefit.

[148] Q. Now, in other instances the person who is writing the Statement of the Case would have had no contact with that file prior to the preparation of the Statement of the Case; correct?

A. That's correct.

Q. So he would look at the rating and the fact that the signature of the medical specialist was contained in the rating, and he would prepare a Statement of the Case paragraph dealing with the medical issue based upon the rating and the fact the signature appeared there? Does that correctly summarize your testimony?

A. Well, I'll tell you what I do when I write a Statement of the Case. We get a Notice of Disagreement, then I look at the rating and appreciate the reasons for the denial as stated in the rating. And then I review all of the evidence of record, including the service medical records, any VA examinations, any VA Hospital summaries or any private medical evidence and conclude for myself that the denial of the benefits is indeed correct.

Then I make a write-up of the Statement of the Case, wherein I chronologically list the evidence that has been received and chronologically list the adjudication action—in other words, the rating and the Notice of Disagreement.

Then I ascertain the appropriate laws and regulations and cite them. And then I explain the reasons for the decision, what the facts have shown and how those facts apply to the law, and try to put it in words that the claimant is going to understand. I try not to make it particularly [149] legalistic.

Q. Now, in instances, however, where a verbal opinion was rendered by the medical specialist to a rating board member who does not eventually prepare a Statement of the Case, there is no way for the person preparing the Statement of the Case to have knowledge of that verbal medical opinion; is that correct?

A. Theoretically that medical opinion would be incorporated in the decision in the rating.

Q. I understand that. I'm talking about the exact substance of the verbal opinion. Since you have already testified there is no place in the file where verbal opinions are placed in writing, and combine that with the fact that a different person often prepares a Statement of the Case from the person who received the verbal medical opinion, there is no way in that situation where the person preparing the Statement of the Case would have exact knowledge of that verbal written opinion. Correct?

A. Well, I don't agree with your conclusion. I think that in the ratings that are written that the doctor signs, by reading the rating you can understand the medical basis for the decision.

Now, the reasoning shown in the rating might not be the exact words that the doctor used in verbally giving an answer to the specialist, if that's what you mean.

Q. There would be no way for the claimant to know the exact words used by the doctor rendering the verbal opinion from reading the Statement of the Case? Do you understand [150] the question?

A. Yes, I understand the question. However, I don't think that it is particularly relevant, because the Statement of the Case would explain the reasons for our decision, which would include the medical basis for the decision.

* * * * *

Q. In the cases where there is a verbal opinion there is no way for the claimant to know from reading the Statement of the Case the exact language that the doctor used in rendering that verbal opinion to the rating board member?

A. I would agree that it is not possible for the claimant to know the deliberations and the exact words used [151] by rating board members when reaching a decision.

Q. In fact, there is no way for the person preparing the Statement of the Case to know the exact language used by the doctor in rendering a verbal opinion to the rating board member unless he was that rating board member himself?

A. Or unless the exact words are shown in the rating decision.

Q. Correct. Is there a requirement that the exact words be shown in the rating decision?

A. None whatsoever.

* * * * *

[153] Q. Now, can you explain the referral procedures you go through in a radiation case in terms of working up the medical side of the case? When I say in a radiation case, I'm referring to an atomic radiation case.

A. Well, we have a pattern letter that we would send the claimant. And basically what it asks is, "What atomic tests did you witness?"

Q. I don't mean to cut you short, but we have already seen that in an example of the files on Friday; right?

A. Yes.

Q. I think in several exams, the date and time of the shot, who was present, whether a radiation badge was issued and so on.

A. Right.

Q. I think we have that already in the file.

A. Okay.

Q. Apart from the pattern letter, what else do you do in terms of the medical workup of the case?

A. Well, the same letter asks the veteran for authorization forms for all medical evidence relating to claimed conditions. And this is basically the place that we start on all claims. We ask the veteran to tell us where he [154] has been treated and by whom and give us authorization to get it.

If it was treatment by the VA or some military hospital, we don't need the authorization to get it. But if it's from a private source, we have to have the authorization.

Routinely we request, of course, the service medical records. So this is the medical workup that we would go through. We would obtain all service medical records, all VA records, all private records, amass them, and then determine whether or not a VA examination is warranted. We might well order the exam early on in the process, once we determine that it's necessary.

Q. Can you recall any case where you have ordered a VA exam in a radiation case?

A. No, I haven't. I'll take that—

Q. Well, what are—I'm sorry.

A. I take that back. I have ordered one. It didn't directly deal with the radiation issue.

Q. Okay. Have you ever ordered a VA exam dealing with a radiation issue in a radiation case?

A. No. But as you can imagine, oftentimes the veterans claim many things in addition to the radiation, and so you would be having an exam for other reasons.

Q. Now, can you explain the standards you employ in making the decision about whether or not to order an exam?

A. In what kind of case, or in all cases?

Q. In a radiation case.

A. Well, we would order an exam in a radiation case if [155] there was a reasonable probability that the claimed disability was the result of documented radiation exposure. It would be the same standard as any ordered exam. The standard is a reasonable probability of a valid claim for benefits.

Q. How can you make a determination as to whether there is a reasonable probability of a valid claim before you get the medical evidence?

A. Well, that's a very good question. Earlier on I was saying that there might be a case where the evidence was overwhelming from the beginning. It could exist. The normal case would be, of course, that it would take some time to develop the evidence.

Q. Now, I take it that all the radiation claims that you have adjudicated as a member of a rating board, there was an absence of a reasonable probability that the disability was a result of documented radiation exposure?

A. Yes. I have never seen a case where the documented radiation exposure was more than slight.

Q. And this is again—when you refer to documented radiation exposure, you're referring to the information you receive from the Defense Nuclear Agency?

A. Yes. Also the number of cases that I have seen, as I testified before, are not many. I think I said maybe 20. And many of those cases were cases where the veteran claimed conditions that were clearly unrelated to any possible amount of radiation exposure—for example, the aortic stenosis case.

[156] Now, I have done some cancer cases, and some of those were death cases, so it wasn't possible to order an exam.

* * * * *

Q. Can you explain the types of tests you are familiar with which you might order in a radiation case if you were convinced that a particular claim had the level of merit to order a physical exam?

A. Well, I don't really know what kind of tests you're referring to. I would just order a general examination of the disability in question and, if necessary, order a specialist's exam for that portion of the anatomy.

Q. Are you aware of the fact that in cases of an inhalation and ingestion of radiation, that radiation elements lodge in the tissues?

A. I am not a scientist, and I don't pretend to understand how radiation affects the body, no.

* * * * *

[157] Q. Now, in your adjudication of radiation claims has the subject of ingestion or inhalation or how to reconstruct a dosage of exposure by those means ever come up?

A. Not to my knowledge. In all the cases that I have worked on we have received a report from the military branch of the recorded exposure or the reconstructed exposure. That's all.

Q. So you basically rely on what they furnish you from the Defense Nuclear Agency?

A. Yes.

[158] Q. And if they ignore inhalation and ingestion, you ignore inhalation and ingestion; is that correct?

A. Well, I did have one case that I recall the veteran said that he was exposed in that manner. We considered it, but it didn't make any difference in our decision. We still denied the case.

I think that I would like to say that we do have some instructions in the Program Guide that we talked about last Friday that point out that there are different means in which the person could be exposed and that this exposure would not always be documented and that we should take this into consideration, to consider what the veteran says. And if it's proven that he was at these atomic bomb testing shots, that we should give it more consideration.

Q. Well, my question was, assuming that the information provided by the Defense Nuclear Agency includes only external gamma radiation exposure, you have no method by which you can determine exposure from other sources?

A. That would be correct.

* * * * *

[163] MR. ERSPAMER: Q. Have you ever seen decontamination reports prepared in connection with Operation Crossroads, the so-called XRD reports?

A. Not to my knowledge.

[164] Q. Are you aware of the fact that one of the conclusions reached in the decontamination reports during Operation Crossroads was that the condenser and salt water piping systems on the target and nontarget vessels that

participated in Operation Crossroads were contaminated with dangerous amounts of radiation?

A. I have no specific recollection of that fact, no.

Q. Well, assuming that that fact is true, you would consider that a relevant fact, would you not, in the adjudication of an atomic veteran's claim with regard to Operation Crossroads?

A. Yes, I think it would be a factor that would be considered.

Q. And it would be one you would want to know in order to properly develop the claim, would it not?

A. We would want to know all radiation exposure.

Q. So your answer is yes?

A. Yes.

* * * * *

[166] Q. Now, in your experience have you ever come to the conclusion that claimants represented by service organizations do better as a class in the presentation and prosecution of claims than unrepresented claimants, people who represent themselves, in other words?

A. I have never come to such a conclusion. I think that in the main, the routine cases, the simple cases that come in, it wouldn't make any difference.

* * * * *

[167] Q. You have come across quite a few situations or instances in the time you have been in the VA where the VA has made an error, have you not?

A. Rating boards are composed of human beings. Human beings make errors.

Q. You have come across quite a few errors made by rating boards in the past, have you not?

A. Well, I have worked on the rating board for six years, and I have written a few clear and unmistakable ratings, yes.

Q. And you have seen other clear and unmistakable rating errors done by other people?

A. Yes.

Q. You said it's only in the more complex cases where representation is necessary. What are the cases that you

consider the most complex of the ones that are currently being adjudicated by the VA?

I believe in your earlier testimony you already indicated, I think, that the post-traumatic stress cases were one of those. Is that correct?

A. Yes. The whole gamut of cases that you have been asking me about—radiation, post-traumatic stress, the unemployability, the asbestosis, the medically complex disabilities and the difficult causation questions that deal with medical facts, and the difficult legal questions which require judgment. I would just generalize by saying the complex factual and legal situations that require judgment.

Q. Can you detail, if you would, some of the difficult [168] legal questions that require judgment?

A. Well, I think any time you have to deal with a presumption, then this makes the case much more difficult.

Q. You have presumptions in the case of some of the chronic diseases—

A. Yes.

Q. —in the Pacific—

A. Yes.

Q. —that were suffered during World War II?

A. Oh, no. There is a one-year presumpion for 30 or 40 chronic conditions. The multiple sclerosis cases are particularly difficult, because there is a seven-year presumption. And what is necessary is a showing of any manifestation of the disease during the presumptive period. And multiple sclerosis has many manifestations. Those are very complex medical-legal questions, I think.

Q. In addition to the cases that have presumptions, what are the other difficult legal questions that require judgment which you referred to in your earlier testimony?

A. Oh, I think the cases that one disability proximately causes another disability. For example, I had a case of a man who was service connected for diabetes, and he went into insulin shock and wrecked his automobile and fractured his arm and developed paralysis of the arm, complete paralysis. So there are causation issues.

We do deal with claims of negligence at VA hospitals. Under 38 USC 351 we can pay compensation for additional

disability caused by VA medical or surgical treatment. [169] However, a finding of negligence or, quote, an accident—that is, an unforeseen, untoward event—is necessary.

Those, I think, are the most interesting and the most complex cases that we deal with.

* * * * *

MR. ERSPAMER: Q. Now, what other instances, if any, can you point to in the category that you mentioned of [170] difficult legal questions that require judgment, besides presumptions and the other ones you have indicated?

A. I think questions of aggravation by military service of a pre-existing disability require a lot of judgment and are difficult. Oftentimes the serviceman entered service with a disability, and the question is, did it become worse during service, beyond normal progression for that disability or disease.

Q. Can you give us an example?

A. Oh, take, for example, a person who had childhood epilepsy, had seizures as a child, took medication, and then about the age of 15 stopped taking the medication and had no further seizures, went on active duty, they accepted him, and while on active duty he had seizures. Should that be service connected by aggravation, or was the seizure condition not aggravated beyond normal progression?

And there are different standards for peacetime service versus wartime service.

Q. I don't understand. Different standards for what?

A. For analyzing the aggravation factor. If it's wartime service, there must be clear and convincing evidence that any increase in the disability was not beyond that which would be normally expected for the disability.

Take, for example, if a person went on active duty and had Hodgkin's disease, however it wasn't noted, and then two weeks later they found out he did have Hodgkin's disease, say, Stage 4. Well, we know that Hodgkin's disease cannot be aggravated by external factors. So once you establish that [171] it existed before service, then you have to deny service connection, because it is a condition that cannot be aggravated.

But say you have a condition of right knee strain, for example. And say before service he had to have surgery on the right knee, and it was asymptomatic when he went on active duty, and then during service he had another injury which aggravated it. We would service connect that.

I think it's a complicated area, and there are different standards for peacetime versus wartime.

Q. The standards for peacetime, are they more strict?

A. The standards for wartime give an extra benefit to the veteran, because the service is more rigorous. You have to have clear and convincing evidence of no aggravation. Whereas in peacetime you only have to have a specific finding of no aggravation.

Q. What do you look to for those standards that deal with preexisting disabilities and aggravation?

A. Well, they're almost always medical questions of—

Q. No. The standards of proof, I mean, the legal standards.

A. Oh, they're in 38 CFR. I can't give you the citation. I think it's 3.306. It's in that range there.

Q. Is there any place in the Program Guide or the procedural manual that would deal with that that you can think of?

A. No. It's mostly only in the 38 CFR.

Q. Yes. It is 3.306. Aggravation of preservice [172] disability?

A. Yes. There should be a paragraph for peacetime and a paragraph for wartime.

Q. Correct. B is wartime service, and C is peacetime service.

A. Right.

Q. Now, have you ever come across any situation in your experience where a presumption has been misapplied by VA adjudication personnel?

A. Well, clearly I have. I'm sure I have. These things are matters of judgment, and we might at the Regional Office decide to deny and say that a condition did not exist within the presumptive period. And I'm sure I have seen cases where the BVA overruled us and held that it was indeed shown during the presumptive period.

Q. Have you ever come across a situation where the failure of a condition to manifest itself during the presumptive period was relied upon as the basis for denial of the claim?

A. Oh, yes. If the disease didn't manifest itself until several years after service, then clearly service connection on a presumptive basis would not be warranted.

Q. And just because it's not warranted on a presumptive basis doesn't mean that the claim automatically should be denied; correct?

A. No. If sound medical judgment would show that the disability was present during service or that, as in the case of post-traumatic stress, some injury to the psyche occurred [173] during service, then service connection would be warranted on an incrred basis.

Q. Isn't it true that you come across situations where adjudication personnel have automatically denied a claim because of the failure to fall within the presumptive period, without considering whether or not it was a situation in which a link could be shown, let's say in the case of post-traumatic stress, outside the presumptive periods? In other words, they have determined that presumption is absolute, and if you don't fall within the presumption, they didn't look any further?

* * * * *

A. Yes, I understand your question.

I think that we have to look at this in a context of a time continuum. Before we had PTS, either you had a neurosis during service that was service connectable or you didn't get service connection. And either you had a psychosis during service or within the one-year presumptive period, or you didn't get service connection.

PTS gave us a whole new ball game. In effect, PTS said if you can prove a stressor during service, you have a lifetime presumption for PTS. And I used the word "presumption" erroneously. You trace it back to the in-service injury.

* * * * *

[179] Q. So you have been happy with all the instances—well, collecting all the instances in which you

have seen service representatives represent a claimant, you are happy with the representation they provided? You felt that in each instance it met a minimum level of competency. Is that correct?

A. Yes. They endeavored to obtain the evidence that was necessary. They had an understanding of the issues involved, and they had an understanding of the laws involved.

This is an education process for the service representatives. I think we have to bear that in mind. And we can't be too excessively critical of the performance that they render. They are human beings learning how to do their job, as rating board members are learning how to do their job, as attorneys would learn how to do it.

* * * * *

[189] Q. Now, in your earlier testimony you referred to the position of the legal specialist on the rating board.

How many legal specialists are there in the Northern California Regional Office of the VA?

A. In the VA Regional Office in San Francisco there are two legal specialists on the rating board, myself and a man by the name of the Dick Richards, who has been on the rating board since the 1950's.

Q. Is he trained as an attorney?

A. Yes. As a matter of act, he graduated from Golden Gate Law School in 1942.

Q. 1942?

A. Yes. Dick has been with the VA ever since World War II.

There is one other attorney, who had been a supervisor and now he's on the rating board for six months to learn how to do the work. And he went to Golden Gate night school with myself.

* * * * *

[190] Q. Apart from the individuals you have already named who are lawyers, a number of other people within the Regional Office have legal training; isn't that correct?

A. There are some adjudicators, not very many—I know of only two. One fellow passed the bar in Florida, and he's a GS-11.

* * * * *

[191] Q. Is law training a preferred experience for adjudicators and rating board members?

A. Well, in bygone years, 20 years ago you couldn't get into adjudication if you weren't a law school graduate or an attorney. But now college education is deemed satisfactory.

There have been efforts that I know of to hire attorneys. When I worked in the Philadelphia Regional Office, I trained a group of 12 attorneys who had just graduated from law school for—I trained them for three or four months as [192] adjudicators.

Q. Is Mr. Coil an attorney by background?

A. I understand that Mr. Coil attended law school, I believe, in South Dakota

* * * * *

[196] Q. Now, in general it is your perception, is it not, that attorneys request hearings more frequently than claimants represented by service organizations or claimants who represent themselves?

A. I have no opinion on that matter. I would say that the Swords to Plowshares, since they are attorneys, request a significant number of hearings, particularly before the Board of Veterans Appeals traveling board.

I have had hearings where the veterans were represented by attorneys. I've had cases where the veteran was represented by an attorney and they submitted written evidence.

But I think maybe you're correct. Attorneys do like to have hearings and go eyeball to eyeball and flush it out.

* * * * *

[200] Q. Have you ever received testimony from an expert witness at a personal hearing?

[201] A. Yes. I had one hearing where a doctor came in. It was the veteran's brother, but he was an M.D. And he came in and gave testimony.

I have known of people who have had hearings where psychiatrists came in and testified.

Q. Any other instances which you're familiar with where an expert testified.

A. No.

Q. I take it, then, experts are rather rare?

A. Well, their time is valuable, and they can do the same thing in writing.

Q. I believe you mentioned earlier in your testimony that, in your experience, claimants who do request a personal hearing frequently do not show up.

A. That's true.

Q. Have you gained an understanding as to the various reasons why claimants don't show up for hearings? Can you just catalog the reasons you have heard or explanations you have received?

A. Well, there's the usual, that they couldn't get off work or they couldn't get transportation, or this kind of logistical problem.

This is speculation, but I think that many of the claimants ask for a hearing when they're hot about the decision, and when it comes time for the hearing, they have cooled somewhat and decided against it.

Q. So they just deliberately don't show up?

A. Yes. And then also I think that some of the [202] claimants decide that, when it gets right down to having a hearing, that they don't have very much to say. Oftentimes the claimants will come in, and the service representatives will talk to them and decide that they don't want to have a hearing, because they don't have anything to say. But they'll think of some kind of evidence that can be obtained so that we can reconsider on the basis of some new evidence.

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VOLUME III

DEPOSITION OF THOMAS H. JACOBSON
NOVEMBER 2, 1983
(CAPTION OMITTED)

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[222] * * * * *

[A.] Then in 1978, on the December the 14th, 1978, the veteran filed a claim for service connection for leukemia as a result of radiation exposure.

Q. That's for chronic myelogenous leukemia?

A. Yes. The veteran stated that while assigned to the U.S. Air Force and checking nuclear weapons aboard aircraft and in other inspections of weapons as an intelligence officer, he was exposed to radiation.

Also he said he was exposed while assigned as a missile crew commander, when he had to make daily inspections of nuclear weapons.

Also the veteran stated that this leukemia was suspected in 1961, while on active military duty. However, an actual diagnosis was not made until 1978, when a bone marrow test revealed the presence of leukemia.

* * * * *

[229] Q. Then we have a rating decision dated August 14th, 1979, on the radiation claim?

A. Yes.

Q. Do you want to summarize that briefly? It's signed by Mr. Graham—

* * * * *

A. Well, the rating states that the issue is service [230] connection for leukemia. The facts are stated as being that the veteran contends his leukemia is the direct result of the radiation exposure that he has alleged, which we previously mentioned.

Then they go to say that the service medical records are completely negative as to any complaint, treatment or diagnosis of leukemia or radiation exposure during service. Post-service treatment records, they note, show the existence of leukemia in 1978.

In addition, they note that the veteran gave a history of being told about 15 years before that he had leukemia. However, there is no evidence to support this allegation.

And then they note that efforts to locate a record of radiation exposure during service have been unsuccessful.

Finally they state that leukemia first shown many years after retirement from active military duty is not related to service or to a service connected condition or shown to be due to radiation exposure.

So they denied the claim.

Q. And they deny the claim without having service records showing radiation exposure?

A. Yes. Then the veteran was informed of this decision by letter, apparently dated 9/11/79.

* * * * *

[233] A. Okay. Here is a letter from Mather Air Force Base to us.

Q. Dated October 22nd, 1979?

A. Yes. They're telling us that they still want the veteran's treatment records and that they have asked us four times but haven't received them yet.

Here's the veteran's Notice of Disagreement, dated 10/14/79.

[234] Q. What does it say? It's obviously written by the veteran.

A. Yes.

Q. And he says that he has been trying to obtain active duty medical records for ten months, with no answer whatsoever, and he refers to a request being made in December of '78, February of '79, May '79, and October '79.

A. And he points out that he believes that getting his military service medical records would be a vital part of his appeal.

* * * * *

[235] A. Yes. Now, on this form the veteran initially checked that he wanted to have a hearing, but then later he crossed that out and checked no, that he didn't want to have a hearing, and initialed it.

Q. Again, the appeal had been prepared by the veteran?

A. It appears so. There is no indication that it was done by anyone else. However, the veteran was represented by the Disabled American Veterans throughout this process, as indicated on the rating and the Statement of the Case.

Q. Well, it's true, is it not, that thus far in the [236] file, coming up from the bottom through this substantive appeal dated February 18th, 1980, we have seen nothing prepared by a service organization?

A. There was one letter here that was dated 9/13/79, wherein Mr. Poole, of the Disabled American Veterans, informed us that we hadn't told the veteran yet what our decision was, and the veteran was concerned.

Q. I'm sorry. With that exception, there is nothing that appears to have been written by any service organization?

A. No, not that I can tell.

* * * * *

[244] Q. What is the next significant item in the file here?

A. Here we have a letter from the veteran of December the 5th, 1980, where he withdraws his power of attorney that he had given to the DAV.

Q. And he says, "Due to the lack of a viable representation on the part of the DAV, I am withdrawing my power of attorney with your organization as of this date"?

A. Yes. This is a letter to the DAV.

Q. And you received, I guess, apparently, a copy of it?

A. Yes. Here is a letter from the veteran which came with that, dated 12/12/80, where he states he has withdrawn his power of attorney to the DAV and will take over responsibility for the claim himself.

Q. He asks for an audience with the VA to discuss the status of his claim and, quote, "what is needed to process it to a successful conclusion"?

A. Yes. I would take that to mean he wanted to have a hearing.

[245] Q. Okay. Now, turning again to the copy of the letter dated December 5th, 1980, from the veteran to the DAV, have you seen other letters like this, withdrawing the authority for representation?

A. Oh, yes.

Q. You have seen quite a number of them?

A. Oh, I wouldn't say quite a number. I would say I've seen some.

Q. What are the reasons that you have seen for withdrawing authority or consent to an accredited representative? Just catalogue the various reasons that people have given that you have seen.

A. Well, some are statements to the effect that they're not, in their opinion, being adequately represented. Sometimes I think the veterans and the service representatives get mad at each other, and they mutually decide that they want to work with someone else.

Q. Is it more frequently the case that they will substitute another service representative, or do they usually substitute themselves?

A. My experience has been that they will usually substitute another service organization. However, this man was an officer and felt that he could represent himself.

Q. Have you seen other instances in which the veteran has withdrawn his power of attorney in favor of a veteran's organization where he has chosen to represent himself in the future?

A. I have no present recollection of that. I'm sure I [246] have seen it. I've seen thousands and thousands of cases.

Q. Does the VA maintain any record of such complaints about the quality of the service representation locally, or are the letters referred to anyone for action, or—

A. Not to my knowledge.

Q. So there is no way in which such a complaint is really disseminated by the VA at the Regional Office level?

A. Not to my knowledge.

* * * * *

[251] A. Now, here is when I first saw the case. The case came to me, and I wrote a confirmed rating on October the 7th, 1981, which said that—

Q. It's on VA form 21-6789; correct?

A. Yes.

Q. Entitled deferred or confirmed rating decision?

A. Yes. And what I said was that the issue was service connection for leukemia and that evidence received as a result of the Board of Veterans Appeals remand did not establish entitlement to service connection for leukemia.

Q. Were you basing that in part upon the radiation exposure history document dated May 7th, 1981, received from Mr. Nelson?

A. Yes.

Q. The mere absence of dosimetry readings for the veteran does not conclusively indicate he was not exposed to radiation; correct?

A. I think that's a correct statement, yes.

Q. Because a lot of people didn't have dosimeter badges; correct?

A. Well, I really don't know that for a fact. That's my understanding. I can certainly believe it, considering my experience in the army.

Q. Did you make any attempt to determine whether personnel assigned to duties such as that of the veteran in this case were even given dosimetry badges?

[252] A. All of the development in this case we have seen and talked about, and nothing like that was done.

* * * * *

[257] Q. Then we have another BVA decision, do we not, with a cover letter?

A. Yes. This is the final decision. The previous one was a remand.

Q. That's dated March 8th, '82?

A. Yes. We might go through this.

First of all, they state the actions leading to the appeal. They talk about the remand. Then they catalogue the veteran's contentions, which we mentioned before. Then they determine findings of fact.

Then they state the law—

Q. First of all, the findings of fact, number three, doesn't that indicate to you that some service medical records were found which indicated white blood cell counts that were somehow abnormal?

A. Yes, it does.

Q. So there must have been some service medical records to that extent?

A. Yes.

Q. And that has not been reflected yet, has it, previously in the file in any location?

A. That was not shown in the original rating that we discussed on August the 14th, 1979.

Q. And it wasn't discussed in the original Statement of the Case?

A. I don't think so. Let's look.

No, there was no discussion as to that.

Q. And there was no discussion of that in the Supplemental Statement of the Case?

A. No.

Q. Do you have an explanation as to where that came from?

A. It came from the service medical records.

Q. It apparently had been missed by the Regional Office adjudicators?

A. Well, it hadn't been mentioned.

Q. If it had been located, such documents had been located, it would have been addressed, would it not? You would expect it would be addressed, would you not, in a Statement of the Case or a Supplemental Statement of the Case?

A. Well, the Regional Office might have seen it and might not have mentioned it; they might not have seen it.

The BVA goes on to point out that during many physical examinations and hospitalizations complete bloodcounts and [259] hematological studies were within normal limits. No bone marrow biopsies are shown to have been performed. At separation from service—pardon me. Hematology studies were within normal limits.

Q. Just getting back to Paragraph 3, if you had seen medical records which reported elevated white blood cell counts, you would have included that in the Supplemental Statement of the Case, would you not have?

A. Well, not unless those service medical records had been received after the BVA remand. I wouldn't have gone back and catalogued exactly what the service medical records had shown. That should have been done in the original Statement of the Case.

However, as we can see in this case, the original Statement of the Case merely says that service records were found completely negative as to complaint, treatment or diagnosis of leukemia or radiation exposure during service. And that's true.

But as they point out, there were instances of elevated white blood cell counts.

Q. And that relates to a type of leukemia, does it not?

A. That's my understanding.

* * * * *

MR. ERSPAMER: Q. As you sit here today, you have [260] no explanation as to why this elevated white blood count did not previously appear in either the rating decision, the original Statement of the Case or the Supplemental Statement of the Case?

A. No.

Q. Okay. Go on.

A. Then the BVA continues with the findings of facts. No. 8 says the leukemia was diagnosed in 1978, more than eight years after military separation.

Q. Why don't we just stop right there. You are familiar, are you not, with the fact that there is a latency period between radiation exposure and onset of diseases such as leukemia?

A. Yes, I am.

Q. And eight years is within the normal latency period associated with the gap between radiation exposure and manifestation of the disease?

A. Well, I think it would depend upon the level of the exposure.

Q. What is is [sic] the latency period for leukemia that you're familiar with?

A. I am not familiar with any definite standards.

Q. You have never seen statements like six to 15 years or six to 30 years?

A. No.

Finding of fact No. 10, the onset of leukemia is unrelated to any exposure the veteran may have had to low-level radiation during service.

[261] Then the BVA states the law in the case. It must be incurred during service or be shown to manifest itself to a degree of ten percent within one year after service.

Then the BVA goes through a discussion of the case. They state the obvious, that there is no evidence of leukemia in service. Apparently they didn't find the alleged medical opinion in 1960 either, or within the applicable presumptive period.

Then they say nor is the allegation that leukemia was diagnosed during service borne out.

Therefore, they say, the appeal must be considered on the basis of alleged radiation exposure.

* * * * *

THE WITNESS: Then the next paragraph discusses the veteran's allegation concerning radiation exposure. And they say that it is known that the exterior portion of nuclear weapons may emit very low-level gamma or gamma and neutron emissions at the immediate surface of the weapon.

MR. ERSPAMER: Q. Let me stop you right there. Do you know where they got that from?

A. No.

Q. It's certainly not reflected in any portion of the file we've seen so far, is it?

A. No.

Q. Okay.

[262] A. "Those rates diminish rapidly as one moves away from contact with the weapon. Evaluation of exposures to maintenance personnel who are required to work directly on exposed weapons has shown that these workers do not receive doses exceeding a significant fraction of the dose allowed individual members of the general public, as per federal guidelines."

Q. Let me stop you there. There is no evidence of any of that in the file, is there?

A. No.

Q. And there is no evidence of what the general public guidelines of permissible doses are in the file?

A. I think they're referring to acceptable radiation exposure levels. For a lifetime I think it's five rems. I believe it's in that document that I gave you last time I was here from the Defense Nuclear Agency.

Q. Oh, the Fact Sheet?

A. Yes.

Q. Okay.

A. In there it discusses the federal guidelines as to safe exposure to radiation.

Q. Would you consider the subject of the exposures of maintenance personnel who have worked directly on exposed weapons to be a relevant area of inquiry to adjudication of this particular claim?

A. Well, I think that—yes.

Q. This area of inquiry was not embarked on or conducted by the VA in connection with the adjudication of [263] this particular claim; correct?

A. That's correct.

* * * * *

A. Then the BVA goes on to say that in the veteran's case he was not among nuclear weapons maintenance personnel; and his access to nuclear weapons having been only incidental, [264] his exposure to low-level ionizing radiation would have been even less. Consequently, service connection is not warranted.

Q. Let me stop you again. How would you characterize the type of exposure the veteran claimed if it wasn't as a maintenance personnel, if we assume the BVA is correct here, that he wasn't part of maintenance personnel?

A. Well, he was a navigator, I believe. So he was on board the plane, and he said he was in a missile silo. And we have all seen the movies or movie clips of what it's like in the missile silo, where they have the atomic weapons.

Basically the BVA is recognizing his arguments and saying that they don't agree.

Q. Well, he says, does he not, in his statement which is attached to his letter of November 16th, 1981, which is the same as his statement in the substantive appeal—

A. Yes.

Q. —that during his career as a navigator and a combat intelligence officer and a missile crew commander, he came into contact with nuclear weapons, quote, almost daily? Correct?

A. Yes, that's what he says. Yes.

Q. And he said he was on flights carrying nuclear weapons for as long as 32-hour periods?

A. Yes, that's what he states.

Q. And he suggests that the possibility of leakage due to the altitude, pressure changes?

A. Yes.

Q. Do you think that the Board of Veterans Appeals' [265] characterization of his exposure as only, quote, "incidental" is consistent with the claims made by the claimant in this statement of the claimant we have just looked at? I mean, if that's true, if what he claims is true, do you call that incidental?

A. Well, under the law, the decisions of the BVA are final. That's how they saw it. I'm not going to argue with them. You can come to conclusions if you want.

Q. Well, I'm just asking, if you assumed that what he said was true, you wouldn't call that incidental, would you?

A. Well, I agree that even though the veteran was exposed, he was probably only exposed to low levels of radiation exposure. And I agree that the decision denying service connection is probably correct.

Q. But that wasn't my question. Do you want to answer my question?

A. Would I have used the word "incidental"?

Q. Do you think that properly characterizes—if you assume that what he said in that statement is correct, that exposure is more than incidental?

* * * * *

THE WITNESS: Well, it seems from the veteran's statements that it's more than incidental. I don't think I would use that word.

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DEPOSITION OF ALBERT MAXWELL
JUNE 14, 1983
(CAPTION OMITTED)

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[2] * * * * *

EXAMINATION BY MR. ERSPAMER

Q. Please state your full name for the record?

A. Albert Roland Maxwell.

* * * * *

[8] [MR. STOLL] The issue, as I understand it, before the Court is Mr. Maxwell's attempt to obtain representation in processing his veteran's claim. And all the of the factual background going into it is not relevant.

MR. ERSPAMER: Well, I think it is relevant to statutory entitlement to veteran's benefits.

MR. STOLL: No one has questioned that. As I understand it, it has been settled.

MR. ERSPAMER: Fine.

* * * * *

[35] Q. And while you were at Dr. Pepper Bottling Company, did you miss time from work due to injuries or diseases that you had suffered in the service?

A. Not very much there, but the boss knew and I knew I just couldn't do that kind of work. So then I went into the straight commissions work. So if I had to take time off from work, they didn't have to pay me.

Q. And starting from your discharge from the service in December of 1947, and up to the present day, have you lost a lot of work due to the conditions you described earlier, malaria and so on?

A. Mainly the last 10 years. Before that I was young enough I was able to work with pain. But the last 10 years I lost a lot of work and in the last five years, I lost probably 50 percent of the time.

Q. When is the last time that you have worked full-time?

A. It has been over two years ago.

Q. You are not currently employed are you?

A. No. In fact because of my finances, I tried to—I applied for a job at the Veteran's Hospital to work part-time three hours a day or weekends, and they gave me the job.

But I had to get a physical in order to be able to do the work and the doctors turned me down as unfit for employment, unemployable.

Q. When did that happen?

A. Probably April.

Q. April 1983?

A. Yes.

* * * * *

[39] MR. ERSPAMER: Q. Did you get any help from a service representative?

A. No.

Q. Did you receive representative [sic] at the time you prepared this?

A. No.

Q. There was none?

A. None.

* * * * *

[46] Q. And the next document, can you describe what that is? It dated March 30, 1959 from Mr. Kerry?

A. I got this from Mr. Kerry who was a service representative for the Disabled American Veterans in Salt Lake City telling me that my disability had been cut from 50 to 40 percent. They cut, I think it was five percent from malaria and five percent for my eyesight.

Q. Malaria or your scar?

[47] A. Oh, scar was also in that.

Q. And did you take any action to contest that reduction?

A. No, I didn't.

Q. Would you explain why?

A. Well, at that time I was employed and doing quite well and at that time I felt maybe that ten percent could better go to somebody else that needed it more than I did.

Q. Did you agree with there [sic] assessment with your disability?

A. No, because my eyesight was a lost worse than it had ever been.

Q. What your eyesight today tested recently?

A. Yes, in fact they asked me to go to the VA and get a eye exam and bring it back to them.

And I have a copy of the results here and I am considered 20/20 on my right eye and 20200 [sic] on my left which I am told makes it legally blind.

Q. How did your eye condition compare in 1959 to what it is now?

A. About the same.

Q. And had it deteriorated since the war?

A. Well, since I got out of service, yes.

Q. Did you have an attorney representing you at that time?

A. No, I didn't.

Q. Referring to the time, I am referring to the 1959.

A. No, didn't have anybody representing me.

Q. Didn't have a service representative either?

A. No, they just did that on their own, because I had signed the power of attorney with them to represent me and [48] they did that automatically.

Q. I see and did you have a personal hearing in 1959?

A. No, I didn't.

Q. And you never requested one I take it?

A. No, I didn't.

Q. And directing your attention to the next document which is Exhibit C to the complaint, which appears to be a letter from you to the Veterans Adjudication Board, Veterans Administration can you identify what that is?

A. Yes, on December 5, 1982, just prior to that, I filed a claim while I was in the hospital, multiple myeloma.

My wife had written a letter asking my compensation be increased because I was in the hospital and disabled.

Q. Let me stop you for a second. Is that separate from the previous claim filed for multiple myeloma?

A. No, same one. This is in November. And I was in the hospital for so long the date of my personal hearing came up only two or three days prior.

Q. When you got out of the hospital?

A. When I got out, so I went up to the DAV offices and talked to a Mr. Kerry and asked him to delay my personal

hearing because I didn't have time to prepare for it. And he made some notes and said would he do that.

Well, I waited and went back to the hospital, I waited and waited six or nine months and found out he hadn't done anything about it he had retired.

Q. He never notified you he had retired?

A. Never notified me, no.

[49] Q. And up to—what did you do then, is that this letter you wrote?

* * * * *

A. In answer to this, I have the letter I think that you have there that I wrote back.

Q. Okay I will hand you this stack and you can show me?

A. It is right here.

Q. Okay, that is the same letter, right?

A. Yes.

Q. Now, did you get a reply to your letter, to this letter that is Exhibit C to the complaint?

A. No, I did not. I went in and at that time they had a different service representative there, and about that time. Of course, we had made up our mind that we were moving to California, so I contacted the DAV here and that is when I first came in contact with the DAV representatives here in San Francisco.

MRS. MAXWELL: And we realized that we would have to do all this work ourselves and getting all of our records and everything that we needed to do.

THE WITNESS: This is when we started it.

MR. ERSPAMER: Q. All the other exhibit we went through and attached to the complaint were prepared after this date, December 5—wait I don't think they could have been. Let me check back here. Maybe they were. All of these were—

* * * * *

[50] Q. My next series of questions will be directed to before this time when you had all this substantiation prepared and will relate to Mr. Kerry.

What had Mr. Kerry done to develop the facts in support of your claim for multiple myeloma?

A. Absolutely nothing.

Q. And how many contacts had you had with Mr. Kerry?

A. Just two.

Q. Can you describe what they were and when?

A. Well, the first contact was after my wife had written a letter to the Adjudication Board asking that my compensation be raised because I was in the hospital and disabled.

Q. And then after I was able to, and after they turned down my claim, I went into the DAV to file for appeal and to get a personal hearing on it. And at that time he said he would do that.

Q. Mr. Kerry you are referring to?

A. Yes. He said he would do that and then we waited and waited to get some kind of an answer from him and after several months we went back in there to find out that he was not in office any more.

Q. And had you ever been interviewed by Mr. Kerry to get all the fact about your claim?

A. Just, he briefly asked me some questions when I went in [51] to file for the personal hearing.

Q. And how long did that meeting last?

A. Three or four minutes.

MRS. MAXWELL: And at that meeting, with him, I was with Al, he said, of course, you don't just write a letter, even though I had outlined everything and dated things, you don't just write a letter, this is ludicrous, you have got to produce some evidence, you have to get your records, you have to do this in detail. And then, he said—I said are you aware that Al was where he was, where his camp was located and he was exposed and he said no, I am not.

So we discussed that with him, and the fact that we were trying to locate someone that could substantiate that he was in the same camp with him that it would take us time to locate them and he said all right, I will see that this is taken care of.

He did make a phone call while he were in the office and typed something, a short paragraph and said all right, I will notify you—is the last, when he went back to the office

to check there was nothing filed in the office concerning that he had ever even be in.

MR. ERSPAMER: Q. Is that correct?

A. That is correct, yes.

A. And then at that time then I—we had made up our mind and discussed it and we have been moving here because our daughter lived there and we didn't have any other relations in Utah and we contacted the DAV here in San Francisco.

Q. I will get to that in a minute. I still want to [52] concentrate on the period before you moved to San Francisco.

So I take it no medical expert had been retained on your case?

A. No.

Q. No medical examinations had been performed by an independent medical specialist?

A. No.

Q. And none of the witnesses to your exposure had been interviewed?

A. No.

Q. Was anything done at that time—this point?

A. No.

Q. And had the Veterans Administration helped you or assisted you in developing facts in support of your claim at this point?

A. No.

Q. Had you had contact with anybody at Veteran's Administration directly let's say by phone?

A. Well, I contacted the VA representative at the hospital and what he said is just prepare a case. He said get it in writing.

Q. Did you have an idea of how to go about that at that time?

A. Not at all.

* * * * *

[53] Q. And now, again referring to the same period of time and before, had you consulted with any attorneys about representing than your claim?

A. Yes, before we started preparing this file, I contacted Richard Medsker. M-e-d-s-k-e-r.

Q. And he is a lawyer?

A. A lawyer in Ogden, Utah.

Q. And what did—for what purpose did you contact him?

A. I went in there to discuss this with him. He was handling some financial problems with me, so while I was there I asked him if he couldn't represent me an against the VA to get my pension increased.

Q. Let's take one question at a time. What prompted you to go to Mr. Medsker?

A. Because I didn't get any results from the VA or from the DAV.

Q. And did you feel competent personally to handle this whole process at the time?

A. No, because I didn't know what to do.

Q. Were you aware of the various government regulations [54] dealing with death and disability compensation?

A. No, I sure was not.

Q. Did Mr. Kerry seem to be aware of the various rules?

A. If he did, he never mentioned it.

Q. What did Mr. Medsker tell you when you asked him whether he could represent you?

A. He said I would love to help you Al, but I can't. I asked him why, he said it takes a lot of time and a lot of research and all you can pay me is $10 and he said I absolutely cannot take the time to do it.

Q. Was that the first time you learned of the fee limitation?

A. That was the first time.

Q. What was your reaction?

A. I was shocked. In fact I didn't believe him, so I went and a friend of mine gave me a book, I forget the name and I looked it up there and sure enough that fee limitation was in there. And later on, after I got to talking to Mr. Medsker, I found out that he encountered this same problem with his Father at that time he was trying to prepare some kind of a suit and or something for his father, but he said he couldn't take the time to do it, because he depends for his livelihood on paying clients.

Q. Did you ever make any further effort to contact any attorneys after you learned about the fee limitation?

A. Not right then, no I didn't.

Q. Why not.

A. Because I was sure that any other attorney if that were [55] true, which I didn't know, would have the same answer, I couldn't see anybody spending all that time doing all that research for $10. I know I wouldn't.

Q. And were you prepared to pay an attorney more than $10 to represent you?

A. Absolutely.

* * * * *

[56] Q. And can you explain whether or not you were satisfied with the representation afforded by Mr. Kerry?

A. Well, it goes without saying I was very, very disappointed because I didn't get anything from him, absolutely nothing.

I assumed that things were done that were not done and I wasted probably six to nine months that I could have been doing for myself because I thought it was being taken care of.

MRS. MAXWELL: When we sat in that office his reaction to Al and the way he was treated, he said, he made one statement, he said had you felt anything about this at all you would have appealed in 1959. And I did say, well, I wanted him to, but he didn't wanted to, but I mean his attitude was absolutely antagonistic negative and I told Al as we walked out of this office, I said he is not going to do anything for you.

And he said to me, it will be fine. He knows what he is doing and let's trust him and that was it.

[57] THE WITNESS: That is basically true. I mean, I felt that maybe we caught him hungry or something and just not in a good mood but that is basically what he said, that I should have started to rattle the chain in '59 when I was cut from 50 to 40 percent.

And as I mentioned at that time, I didn't feel I needed it and thought it would be better applied to somebody else that needed it.

MR. ERSPAMER: Q. And have you heard other veterans comment about the fairness of the fee limitation?

* * * * *

A. Well, yes, I have almost every day in any of the VA hospitals, you talk to veterans that are trying to get their compensation increased and they run up against a brick wall because they have no—they can't tell a service representative, well, you do this for me. If the service representative wants to do it, he will do it when he can get around to it.

At least if you had an attorney that was able to get a fee, you would feel he is working for you.

MR. ERSPAMER: Q. Well, did you personally have a feeling that the service representatives were not "Working for you?

A. Well, I think they do their best but they are far, far over worked, I know everyone I have been to has had stacks of cases waiting on their desks, three and four feet high and I just don't think they have the time to devote to it.

Q. What other service representative have you had contact [58] with?

A. A Mr. Parker, John Parker at the DAV office here in San Francisco and a Mr. Stan Lore, here at this office.

Q. I would ask you to describe the circumstances under which you met John Parker?

A. Yes, I had—the representative that took Mr. Kerry's place came and find out who was in change of this officer here and he contacted Mr. Parker and told me and I talked to Mr. Parker. When I came here to San Francisco he was the first person I contacted. He interviewed me first.

Q. How long did he interview you?

A. He interviewed me, oh, a good two hours.

And first he asked me why I came to him. And I mentioned the fact then that we were considering moving here to California, and so then he went ahead and interviewed me. And we were there I would say two to two and a half hours.

Q. When was this?

A. That was in January of 1983.
Q. So that was just five or six months ago?
A. Yes.
Q. And.
Q. Did you communicate with—up to that time had you ever had a personal hearing in front of the VA?
A. No. It was his recommendation that I have a personal hearing and have a medical examination.
Q. Okay. And I hand you what has been marked as Plaintiff Exhibit No. 20, can you identify that?
A. Oh, yes, this is the transcript from my personal hearing [59] before the Adjudication Board.
Q. And is Mr. Parker asking you the questions during that hearing?
A. Yes.
Q. Did you meet with him prior to that hearing?
A. Yes.
Q. How long did you meet with him?
A. Oh a good half hour to 45 minutes.
Q. That was in a addition to the two and a half hours you mentioned early?
A. Yes.
Q. Did you have any meetings with him in between those two times?
A. No, I had some various conversations with him on the telephone.
Q. Directing your attention to the transcript, there are a lot of corrections made in hand by pen.
Did you make those corrections?
A. No.
MRS. MAXWELL: The chairman did.
THE WITNESS: I don't remember what his name was.
MR. ERSPAMER: Q. Somebody on the local board or the Board of Veterans Appeals?
A. I think it was the chairman that did it.
MR. STOLL: Counsel, is this going to be an exhibit?
MR. ERSPAMER: It is an exhibit. It is Exhibit 20. It has been marked as Exhibit 20.
MRS. MAXWELL: There was a little note attached that the [60] chairman signed and he did say I have attempted to

correct in insofar as I can, I apologize for all the gramatical misspelings and so forth, I finally gave up on it.
MR. ERSPAMER: Q. Is that consistent with your memory?
A. Well, yes it is. The corrections made, he made them.
Q. Were you happy with the quality of the transcript?
A. Oh, it is awful. I think a 12 year old girl could have done a better job.
Q. Any gaps in the transcript?
A. Gaps where she could not understand—or could not spell a word, she left it out.
A. For instance, as an example, he said interned and she put he was "inturned." T-u-r-n-e-d.
That is all the way through it.
Q. Did you ask that the transcript be corrected in any way?
A. Well, he corrected it, he said as well as he could. But he told me if I requested it I could get a tape transcript of it, which I am proposing on doing tomorrow.
Q. To this point you have not requested a tape transcript?
A. I did, but have not received it.
Q. Who did you request it from?
A. From Stan Lore.
Q. That is your service representative?
A. Yes.
MR. STOLL: And he was Stan Lore that was referred to just a moment ago that told you you could get a transcript?
THE WITNESS: Yes.
MR. ERSPAMER: Q. And I believe you also stated he [61] recommended that you get a medical examine. Did you get a medical examine?
A. I did.
Q. And when did that take place, was that a—
A. At the same date as my—a day or so following the personal hearing.
Q. Okay and the personal hearing was held—I think I have it on the front page there of that—of my diary. I think I have it written there on top.
Q. January 19, 1983?

A. Yes. So my examination was probably the 21st or right in there.

MR. ERSPAMER: Can you mark this as next in order. (Whereupon, Plaintiffs' Exhibit No. 22 more particularly described in the index, was marked for identification.)

MR. ERSPAMER: For the record, Exhibit No. 22 is a—appears to be an undated letter from Mr. Maxwell to Mr. Stan Lore. I am handing you that, first to counsel, and it will come down to you in a minute—

While he is looking at that mark that as next in order.

(Whereupon, Plaintiffs' Exhibit No. 23, No. 24, No. 25 and No. 26 more particularly described in the index, were marked for identification.)

MR. ERSPAMER: Q. I hand you what has been marked as Exhibit No. 22, can you identify what that is?

A. Yes, this is a letter I wrote to Mr. Stan Lore, of the DAV, expressing my disatisfaction on my examination at the [62] Veteran's Hospital in San Francisco.

Q. And is the examination referred to in there a different exam than the one you testified about early that happened close to your personal hearing?

A. This is the same one. This is the 24th, I said the 21th.

Q. It was February 24?

A. Yes.

Q. And does that refresh your recollection as to the date of the exam?

A. Yes.

Q. What dissatisfaction did you have with your examination?

A. Well, I was under the impression it would be a very, very complete and thorough examination.

I went in there and the first person they sent me to was a psychiatrist and I went into his office and he sat me down and we talked probably for ten minutes, ten or 15 minutes.

And then I was sent over to the medical doctor and he had me take off my shirt and with the stethoscope he checked my heart and pulse and my blood pressure and then he started to ask me some questions.

He noticed I had my brief case with me and asked me if those were my medical records there. I said, "Yes." He said, "Do you mind if I see them?" And I said, "No." And I gave him a copy of my medical records.

And he look down through the medical records and he said, "My gosh, no use for me doing this work. It is all right here. It is documented and it is recent; no use of me [63] just duplicating that work."

Q. What was his name?

A. I don't know what his name was.

MRS. MAXWELL: It would be on record, I am sure.

MR. ERSPAMER: Q. Then what happened?

A. Well, he did give me—he checked my hemorrhoids and he checked my reflexes and had me bounce on one leg and he checked my heart and my lungs and my posture, and probed around my abdomen and he sent me for some X-rays. And that was it.

Q. And what more did you expect was going to occur?

A. Well, I thought that I would get a complete GI series upper and lower GI series.

I thought he would get a sample of my urine particularly on the fact that I had multiple myeloma and that he would give me a blood test, check my blood count, which he didn't do. He never examined my eyes. In fact he did very little.

Q. Anything else that you can recall at the moment that he didn't do that you expected he would do?

A. Well, he didn't really question me, at all on it, and I know because of his age he certainly was not old enough to have lived at that time and I am just of the opinion that he just didn't have any expertise at all on any EX-POWs diseases.

Q. Now, over the years have you ever been treated at the Veterans Administration Hospitals or private doctors or both?

A. Mostly the Veteran's Hospital. Two or three time I had emergencies where I had to go to a private doctor.

[64] Q. And how would you describe your experience with the diagnostic skills of the VA doctors?

A. Very good as far as they go, but they will not commit themselves to anything. I am sure that my doctor that I

have been going to the one there—been going to for the past years has saved my life.

Q. What doctor is that?

A. Dr. Jenson. He is the one that finally made them take a bone scan and bone marrow biopsy.

Before they discovered I had multiple myeloma, they were treating me for arthritis for six months to a year before that time. I got so bad I could not walk without a crutch or cane. But until recently, they would absolutely not document anything. I mean they would say that I had this, and these symptoms and these symptoms, but they were all symptoms. They would not say what caused them.

Q. I hand you what has been marked as Plaintiffs' Exhibit No. 23, can you identify what that document is?

A. Yes. I can—this document is—I had asked the doctor at various times what was causing my edema and he would not commit himself. So finally, I—this was after another document there by a Dr. Diess.

Q. Can you spell that for the reporter.

A. D-i-e-s-s

Q. The one marked as Plaintiffs' Exhibit No. 24?

A. Yes.

Dr. Diss is the head of the hemotology section at the Salt Lake Veterans Administration Hospital and Dr. Jenson, [65] would not state what was causing my edema because he said that should come from the hemotology clinic. So the hemotology clinic made this statement which is Exhibit 24, to the fact that my edema was not caused by my multiple myeloma and consequently after that then Dr. Jenson made this statement to the fact that he concurred with their findings and that my edema would be caused from some other cause rather than multiple myeloma and also he stated that—in fact along with this, I have a picture that I need to show you on that.

Q. Is that this picture here?

A. Yes, where it shows my right flank bulge which I have had complaints on, well, since 1947.

MR. ERSPAMER: Let's pause for a minute to have that marked as Exhibit 27.

(Whereupon, Plaintiffs' Exhibit No. 27 more particularly described in the index, was marked for identification.)

MR. ERSPAMER: Q. I hand you what has been marked as Plaintiffs' Exhibit No. 27. Why was it an issue as to whether your multiple myeloma caused your edema?

A. Because thay had differences of opinions between the doctors. Some of them figured my edema was caused by the multiple myeloma and Dr. Jenson was under the impression there had to be something else maybe in my kidneys or liver.

So he said it was not—it didn't behoove him to make a statement as long as the hemotology clinic didn't carry on file the fact it was not caused by myeloma and after they [66] made the statement he did this.

Q. Did you have a claim for service connection based in part on your edema?

A. And the fact of the right upperquandrant pains.

Q. And that is reflected in Plaintiffs' Exhibit No. 26?

A. Yes.

Q. And is that a copy of your signature that appears there?

A. Yes, it is. Now, this is what I—this is what I gave John Parker when I first came in with my claim but for some reason or the other, they didn't list only about a third of these problems.

Q. Who didn't list?

A. He didn't, to go before the board, personal hearing board.

Q. Which ones did he exclude?

A. Well, he never—muscle spasm was never mentioned. Chronic headaches, insomnia was never mentioned, edema was never mentioned, itchiness or swelling was never mentioned. Heyfever was never mentioned.

Q. Was that ever discussed with you?

A. Yes, it was discussed.

Q. Did you agree with that; not to submit those issues?

A. No. No. And that is it. And I have all of these documented to the fact that I did have them and the prescribtions [sic] that were given to me for them.

MRS. MAXWELL: The rash was mentioned, insomnia was mentioned by me when they interviewed me.

MR. ERSPAMER: Q. Well, were you unhappy with the fact [67] that he had not mentioned those conditions?

A. Well, I thought he had a reason for it. So I was trusting him for the fact that he had a reason but I didn't know what it was.

Q. He never explained to you?

A. No.

* * * * *

[78] Q. Now, I want to go into another area which is—again a little personal and that is your financial condition at the present time.

What are your current sources of income?

A. Well, I have $259 from the VA on a 40 percent disability rating and then I am on social security disability which is $558 and that is it.

Q. So you live on approximately a little over $800.00 a month?

A. Right. We exist. We don't live.

Q. And you find that it is difficult to make ends meet?

A. Almost impossible.

My wife is employed when she can be, but she does not feel like she can be away from me that much, because I have had times when it was fortunate that she was around.

Q. And how long have you had financial problems?

A. Well, it started about four years ago, four—five years ago when I started missing so much work.

I was self-employed, so I didn't have to answer to a [79] boss, but I had to take more and more time off work. So my income dwindled and dwindled and so did my assets. I had to dispose of my home and it went as far as—got down to where I had to take out personal bankruptcy.

Q. When did that happen?

A. About 18 months ago.

Q. Was an a Chapter XIII proceeding?

A. Yes. I went in with my attorney and asked him if I should not take out Chapter XI, he said absolutely not, no way you should take out XI, you take out Chapter XIII. There was no way I could have paid it back.

Q. Did you have debt associated with medical problems of your children?

A. Yes. Because of—the first, well, for instance, both Michelle—or both Paulette and Michael spent two-thirds of their lives in the hospital. Both of them.

Q. When did you finally pay off those medical bill?

A. Well, it is took me 15 years to pay off just my medical bills on those two children.

Q. Do you recall how much in magnitude they were?

A. No, I don't, but I paid $250 a month for it seems like forever and forever.

MRS. MAXWELL: For example, the first year of Paulette's life we had medical bills of $6,000.00 over what he made and had they not be treated in a Catholic hospital I am sure we would have been haunted to death. They gave us the recourse of paying it off as we could.

MR. STOLL: By the way I do not object to these lines of [80] questioning and I will withdraw my objection.

MR. ERSPAMER: The ones about income, you mean?

MR. STOLL: Yes.

MR. ERSPAMER: Q. Now, you said you had to sell your home. Did you have to sell other assets you had?

A. All my assets, I had several rental properties. I had quite a bit of land, recreational land and we had a place—summer place on a lake. We had to dispose of all of that and, of course, I had my toys. I had a boat and snowmobiles and which I used in my work.

Q. Did you have to sell all of those too?

A. Yes.

Q. Do you currently have any savings?

A. None.

Q. And do you rent right now?

A. Yes I have rented for the past three years.

And I had to move once because the rent was so high I could not handle it. So I had to move to a lesser place.

Q. Now, on or about 1970, or so, you filed an another disability claim in the Veterans Administration; is that right?

A. Yes. I was in the hospital, admitted to the hospital with some kidney problems and at the time, I filed to have

my compensation increased because of that and I was denied and I was given time to file an appeal but I didn't file and appeal, because at the time I got out of the hospital and I was again fully employed, so I didn't pursue it any further.

* * * * *

[81] MR. ERSPAMER: Q. Handing you what has been marked as Plaintiffs' Exhibit No. 28, is this the letter that you wrote, about reopening your claim in 1970 for a kidney condition. Again this is a document produced by the VA out of your file.

A. Yes. That is.

Q. Is that your signature there?

A. Yes, it is.

Q. Did you draft that?

A. Yes, I did.

Q. And that is the claim that you indicated was denied—

A. —let's see—

Q. —And without going into too much detail, is Exhibit No. 29 the notice of denial that you claim you received with regard to your kidney condition?

A. Yes.

Q. And do you recall Exhibit No. 30, which is the rating decision with regard to that?

A. Yes, that is correct.

Q. And Exhibit No. 31, is that your notice of disagreement dated January 18, 1981, disagreeing with their decision on your claim?

MRS. MAXWELL: You said 1981.

MR. ERSPAMER: I'm sorry.

[82] Q. 1971?

A. Yes, that is correct.

Q. Did you ever follow through with that notice of disagreement?

A. No, I didn't.

Q. May I ask you to explain why?

A. Well, I was released from the hospital and became fully employed and busy with my employment and I

couldn't at that time afford the hassle following it up. And at that time I was doing pretty well financially.

Q. So you just abandoned it.

A. Yes, I just abandoned it.

Q. Did you consult a lawyer before you abandoned it?

A. No, I didn't.

Q. So there was never an appeal?

A. No, there was not.

Q. And at that time you abandoned it, did you still have faith in the merits of your claim?

A. Oh, yes. In fact, I was hospitalized several times for the very same condition after that.

Q. And you did not bother filing a claim?

A. No, I didn't.

Q. And why didn't you bother?

A. I really don't know.

I guess I got tired of fighting the system.

Q. But, you—

A. But, you know, I didn't really pursue it vigorously until I had no other option because I had to because my [83] livelihood depended on it. At that time it didn't.

Q. Did you experience frustration in dealing with the Veterans Administration at that time?

A. Probably too much frustration. Probably if I had not been so frustrated maybe I would have pursued it and maybe something would have happened, I don't know.

Q. Well, has there ever been a time since you got out of Nagoya Camp No. 6 where you have been free from any physical ailment arising out of your interment?

A. Never. There have been times when I felt much better than other times. After awhile you learn to live with it. It becomes a part of your life, you can't dwell on it. You have to life [sic] with it, the same as if you have a bald head or scar on your right check or club foot, you learn to live with it and that is it.

* * * * *

[85] Q. Now, at some point in time did you try to obtain your service records from the VA?

A. Yes, the first time I did, I tried to file for an FHA loan and I asked for my military records, because I needed

a copy of my separation and my discharge and my enlistment records.

And I got back a form stating that my records had been destroyed at St Louis in a fire. And a couple of times since then I have requested other records and they have not been able to produce them for me. They told me they were lost or were in the first or destroyed or something.

Q. Was that the fire they had in St. Louis around 1973?

A. Yes.

* * * * *

[86] Q. And did you ever discover that your—or ever see any of the service records that the VA claimed had been destroyed in a fire at at [sic] later time?

A. I did on some of them, yes.

Stan Lore had some that I had never seen that I had requested.

Q. And when was that? Was that this year?

A. Yes. He sent me—I asked him to send me a copy of all of them, and he did and there were somethings I had never seen.

[87] But I still have never been able to obtain a copy of my original discharge.

Q. Did you have any of trouble proving that you were there in the prison camp?

A. Oh, no. They evidently have evidence of that, because they always accepted that.

Of course, they could not very well otherwise, because they have records of me being in Madigan General Hospital and Camp Carson, Colorado, and I requested the record for that and they were not able to get them but Stan had them.

MRS. MAXWELL: Other medical records to reproduce, around 1965 my daughter tells about, I think between '65 and '66 he was hospitalized on and off for almost three months' time, during which time his white count was well over 100,000 and I was advised to go to work by the doctors because they thought he had leukemia at that time.

Then the white count returned to normal and they told us it was not a possibility but a probability that he was—definitely had some kind of blood disorder and our family physician said, "I tell you that within 19 years. . . ."

—this is when he first examined him— ". . . of this date you are going to find that he will have problems related to that exposure and probably in some form of a cancer."

Of course, we had no idea it would be something like this, but we cannot get copies of that.

MR. ERSPAMER: Q. You have not been able to get copies of the records showing the leukemia count?

A. When I go they say this is all we have. They don't say [88] they have lost them.

Q. What hospital?

A. The VA. The same one.

Q. In Salt Lake City?

A. Yes.

Q. And how many blood tests did you have in that series when you had the high blood count?

A. Oh, I had to come back about two or three times a week for a period of 90 days.

Q. And to date you have never seen those medical records?

A. No.

Q. And the VA has been unable to produce them; is that correct?

A. Right, and we asked the doctor who treated me and he said I really don't remember because the doctor is still there.

Q. And have any of your doctors told you that would be related to your claim for multiple myeloma?

A. No, in fact no doctor stated that until Dr. Lammabert stated it and from then on I am getting some positive statements.

Q. Has any VA doctor told you that your multiple myeloma is perhaps associated to your exposure to radiation in the service?

A. No.

* * * * *

[91] Q. Now, based upon your experience in the Veteran's Administration, do you agree or disagree with the statement that the Veteran's Administration adjudication process is non-adversarial.

* * * * *

MR. ERSPAMER: Q. In what sense is the VA process adversarial?

A. Well, I understand, according to all the VA literature I have read, that any benefit of the doubt should go to the veteran. But I have not gotten any benefit of the doubt.

They know that I was there. And know the bomb was dropped and know that I was exposed and they have probable cause to think that my myeloma might have been caused by that. But I have not been given any benefit of the doubt or any consideration whatsoever.

They just plain say that it is denied on the basis that I can't prove it was caused by my exposure to radiation. Even though I have a statement from an expert-in-which she claims beyond any reasonable doubt that she is convinced that is what caused my myeloma.

Q. Has the VA ever referred you to a expert hemotologist for an opinion on the causation?

A. No, not to the causation, never.

Q. Have you ever had any problem in getting responses to mail or letters you sent to the Veterans Administration?

A. No, I get responses, not the ones I want, but I get responses. Yes.

* * * * *

[122] Q. Now, approximately in 1970, you sought an increase in your disability rating from above 40 percent?

A. That is correct.

Q. And that was based on the medical condition—

A. I was in the hospital having a problem with the right upper quadrant pain and I was hospitalized for quite sometime and I did file for an increase in my compensation at that time.

Q. About how long were you hospitalized; do you recall?

A. A couple of weeks.

MRS. MAXWELL: Well, he was admitted in emergency at a civilian hospital and transferred to the VA and our family physician took care of him for the first few days and then he was transfered to the VA.

MR. STOLL: Q. And approximately how long was it—after you were released from the hospital, did you return to work?

A. Just two or three days.

Q. Did you work fairly steadily after that?

A. The same as before; worked awhile and had to take some time off.

Q. So in 1970, you were nonetheless able to return to work after that?

A. Yes. Yes. I was.

Q. On roughly the same basis you had be [sic] working for the previous—

A. —yes.

Q. And that was reason that you abandoned your claim for [123] any increased benefits.

A. Yes, that is correct.

VOLUME I
DEPOSITION OF RICHARD B. STANDEFER
June 15, 1983
(CAPTION OMITTED)

[3] * * * * *

EXAMINATION BY MR. RAM

MR. RAM: Q. Would you state your full name for the record, please.

A. Richard B. Standefer.

* * * * *

[5] Q. And from 1970 on, you have been associated with the Board of Veterans Appeals.

A. Yes, I have.

Q. And you are presently the Deputy Vice-Chairman of the Veterans Board of Appeals.

A. That is correct.

* * * * *

Q. Could you briefly describe your duties and responsibilities as the deputy vice-chairman of the Board of Veterans Appeals?

A. As I point out here, I do supervise all aspects of what we call one appellate group. That would be nine of the 18 sections of the Board.

[6] The chief members of those nine sections report to me. I am not directly involved and I don't influence the decision-making process as such.

I do have authority to hire, fire, discipline, reassign attorney advisors who work for the Board.

I give technical advice and assistance to attorneys, chief members, medical and associate law members of the Board.

One important aspect of my job is what I would characterize as quality control of decisions of the Board.

* * * * *

[31] MR. RAM: Okay. Counsel, could the witness have your copy? Thank you.

I will read it beginning on page 2.2 of Plaintiffs' Exhibit No. 43 (Standefer Deposition), which is Change 16 to the MBVA-1, under Section 2.05a, it states that, "The senior attorney prepares decisions on extremely complex and controversial appeals stemming from personal hearings held before a section of the Board in Washington or before a travel section in the field office."

Q. Could you give me an example of an extremely complex and controversial appeal?

A. Generally speaking, a multiple sclerosis case can be called extremely complex and controversial.

Q. Why is that?

A. Because signs and symptoms of multiple sclerosis can anticipate any number of other diseases.

There is a seven-year presumptive period for the allowance of service connection in a multiple sclerosis case, when there are manifestations identifiable as being manifestations of [32] multiple sclerosis which emerge during that seven-year presumptive period.

There could be conflicting medical testimony which has to be sifted—some doctors think one thing and some doctors and expert witnesses think another, and it takes an experienced attorney then to sort all those kinds of things out.

Q. Are multiple sclerosis veterans usually represented by attorneys?

A. Usually they are not represented by attorneys. They may be in an instance or two, but generally not.

Q. What is it about an experienced attorney that would enable him to sort out the complex problems of medical proof in a multiple sclerosis case?

A. Well, his skills of sifting the evidence, of course, would develop in years of experience with the Board in doing that very thing, one becomes a good advisor and intimately familiar with the rules and regulations. One develops a facility for—of evaluating various items in the claims folder and one develops the skill to communicate more effectively in writing, to prepare findings of fact and conclusions of law, just through practice—through years of sticking at the job and gaining the experience.

Q. Why does the BVA use attorneys to perform the duties that you have described, for example, sifting through evidence and preparing findings of fact?

A. We feel their legal training better enables them to do that function.

Q. By their legal training, would that include going to law [33] school?

A. Of course. That is what I mean precisely, law school and bar membership.

Q. Still looking at that language that I read to you from Plaintiffs' Exhibit No. 43 (Standefer Deposition), talking about "complex and controversial appeals," can you give me another example in addition to a multiple sclerosis case?

A. Some other complex cases we get are purely cases of a legal nature, wherein there may be a contest among two putative widows, each claiming to be the legal widow of a deceased veteran and hence entitled to survivor's benefits.

Under VA rules and regulations, only one person can be paid as the deemed valid widow.

There may be complex determinations wherein marital relation conflict laws among several jurisdictions have to be resolved and those can be very complex cases.

Q. And what would be complex in those cases would be the law, whereas in the multiple sclerosis cases you have complex medical and factual issues.

A. That is correct.

Q. In the cases that you have just described in which, for instance, you have two putative widows, as you have described them, who are the two widows usually represented by?

A. Most of the time they would be represented by service organizations.

Q. Similarly, in multiple sclerosis cases, the veteran will usually be represented by a service organization?

A. Yes, and that, of course, is our experience generally at [34] the Board, most claimants are represented by service organizations.

Q. Would you give me a third example of an extremely complex and controversial appeal?

A. Radiation cases often are extremely complex and controversial.

Q. Why do you say that?

A. Again, because the medical issues generally are very involved.

There is a great deal of controversy as to the latent semetic effect of low level of ionizing radiation.

There may be subtleties of evaluating and weighing credibility of conflicting expert testimony.

Q. And this is the type of thing that an experience attorney would be best at doing?

A. Yes. Yes.

* * * * *

[105] Q. You have testified to a procedural rule that a substantive appeal must be filed within 60 days of the Statement of the Case, but after that 60-day period, until a year has expired from the notice of the decision, the substantive appeal may still be filed.

Is that rule apparent from the first page of Plaintiffs' Exhibit No. 61 (Standefer Deposition); and specifically, is that one year from the notice of decision rule apparent from the first page of Plaintiffs' Exhibit No. 61?

[106] A. No.

Q. Is that rule apparent at all from the entire exhibit, Plaintiffs' Exhibit No. 61 (Standefer Deposition)?

A. Well, in this particular case, one might argue—I am not trying to give you a forensic reply to what is a straightforward question, and I think I will just answer, no, it is not apparent there.

Apparently, in looking at the Statement of the Case given to this claimant, I would probably know about that, because this involves a case wherein the originating agency had entered a decision, and that decision had not been appealed within one year.

And that is what the entire thing is about, whether there is new and material evidence involved.

But this would just be an unusual situation. You picked a poor example in this case.

Q. Well, I will represent to you that Plaintiffs' Exhibit No. 61 (Standefer Deposition) is a form letter that is sent to—

A. Precisely.

Q. —everybody who files a notice of disagreement, regardless of whether there was something in the case involving the one-year rule. And you would, I presume, answer

that it would not be apparent to the people who receive this Plaintiffs' Exhibit No. 61 (Standefer Deposition), that in addition to the 60 days to file their substantive appeal, they also have the year from the time of the notice of decision; is that right?

A. That is correct.

* * * * *

[110] Q. Have you ever heard of a claimant who thought he had a meritorious case, but failed to file a substantive appeal because he thought he would not receive justice from the VA?

A. No one has ever told me that directly.

Q. Have you ever heard of that indirectly?

A. Sure. Of course. Everyone knows lots of claimants are frustrated with the process and the system.

Q. Could you elaborate on that? What do you hear about claimants being frustrated with the process and the system?

A. Well, all you have to do is pick up a newspaper these days and see how hot and emotionally charged certain areas of our practice have become. And specifically, the Agent Orange issues, to some extent, radiation exposure issues.

* * * * *

[111] Q. What do you hear was the reason given as to why a veteran might have given up? You said not because the system was too complicated, implying there was some other reason that you heard.

A. There are certain veterans who are extremely alienated and have given up on the system, and again, all one has to do is pick up a newspaper to know that.

* * * * *

[122] Q. Then 34.4 percent cases allowed on cases heard by the traveling board, and 13.9 in cases heard by the field office rating board, and then 12.9 percent of the cases allowed where there was no formal hearing.

Can't you conclude from those figures that appellants who request and receive a formal hearing are generally much more successful than those who don't?

A. I think that is a fair conclusion.

* * * * *

[126] MR. RAM: Q. Why do so many claimants waive their right to a hearing?

A. Well, again, for the reasons I have described earlier: to attend a hearing necessarily involves some time and effort.

Q. No other reason that you can think of?

A. Again, I have given this answer earlier: Many times, I think perhaps a claimant feels like all relevant information has already been made a part of the record. There is no amplification that needs to be made in terms of a personal appearance and hearing.

Q. But you can look at Plaintiffs' Exhibit No. 63 (Standefer Deposition) and see that the cases in which hearings are requested, the claimant is generally much more successful.

A. That is correct. That is what the figures would seem to show.

Q. Does the VA do anything to discourage claimants from invoking their right to a formal hearing?

A. Absolutely not.

MR. RAM: Why don't we take a short break.

(Whereupon, a recess was taken.)

[127] MR. RAM: Back on the record.

May I approach the witness? I have an exhibit from the complaint and I have not made copies of it.

MR. NAGAN: Surely.

MR. RAM: Q. Mr. Standefer, this is Exhibit H to the complaint that the plaintiff filed in the case on April 13, 1983, and it is a letter from the local VA in San Francisco to Mr. Reason Warehime, Jr.

A. All right.

Q. Exhibit H reads—and I am reading from the second paragraph now—I guess I will read the whole thing and stop—this is from T. A. Verrill, Adjudication Officer in San Francisco.

"Dear Mr. Warehime:

"We have your substantive appeal wherein you indicated you wanted a personal hearing.

"You are, of course, entitled to a personal hearing. It is, however, our responsibility to advise you of certain facts. First, due to the backlog of scheduled hearings, it would be most likely several months before a personal hearing could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C."

Looking at that first reason that I have just read, which begins, "First, due to the backlog of scheduled hearings," do you think that a claimant reading that would be less inclined to request a formal hearing?

[128] A. Not necessarily, not if he really wanted a personal hearing, I don't think that would discourage anyone.

Q. But all things being equal, wouldn't that sentence I have just read make him less likely—less likely to have him ask for a formal hearing?

MR. NAGAN: I think the question has been asked and answered.

MR. RAM: I don't think I am harassing the witness, and asked and answered is not an objection in a deposition.

Q. All things being equal, wouldn't reading that sentence that I have just read to you, which talks about the backlog of scheduled hearings, and how requesting a hearing will delay the process, wouldn't that sentence make a claimant less likely to ask for a personal hearing?

A. Well, again, I think the only answer I can give you is that sentence apprises the claimant of certain facts that there will be some delay if he wants a hearing.

If he wants a hearing, though, I am sure the claimant would come ahead and have his hearing.

Q. You still have not answered my question. My question is:

All things being equal, when reading that or wouldn't reading that sentence make a claimant less likely to request a personal hearing?

A. What do you mean "all things being equal"? What does that modify?

Q. Assume that this sentence that I just read to you was not here, wouldn't in that instance the claimant be more likely to ask for a personal hearing?

[129] A. I don't know if he would or not.

Q. Isn't that sentence inconsistent with the due process right of the claimant to a hearing?

A. It is not in my opinion.

Q. I will read the next sentence:

"Secondly, a personal hearing in the Veterans Administration Regional Office, San Francisco, would be before the local rating board which has evaluated your case previously, not the Board of Veterans Appeals personnel."

Isn't that sentence designed to discourage the claimant from requesting a personal hearing?

A. It is designed, administratively I would suspect, to inform a claimant of certain facts, that a claimant who has just frivolously, without really intending to make his appearance, should understand exactly what is involved when a personal hearing is requested.

But someone who genuinely wants a hearing on an appeal, I don't see that as being language that would discourage anyone from pursuing that course of action.

Q. And you don't consider that sentence at all to be inconsistent with the due process right to a hearing?

A. I certainly don't.

Q. And you consider that sentence to be perfectly consistent with the due process right to a hearing?

A. Yes.

Q. You also consider the first sentence that I read to you which states, "First, do to the backlog of scheduled hearings, it would be most likely several months before a personal hearing [130] could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C."

You also consider that sentence to be perfectly consistent with the due process right to a hearing?

A. Yes.

Q. You don't think that would discourage a claimant one bit from requesting a hearing?

A. Obviously what this letter is designed to do, is to, as I have said before, inform any claimant, I—well, I have no idea. Is this a form letter or what? I am assuming—my assumption is, now, that this is a form letter sent to all claimants, and whether or not that is true, I don't know.

But if it is, then probably the situation—the regional office involved with it has confronting it a situation where lots of personal hearings are scheduled, and people do not appear for the personal hearings.

This then is meant to inform claimants of exactly what the situation is; what kind of backlogs are facing the regional office, and to ask people if they really are not seriously interested in having a personal hearing, they can speed the claim along by not following their request for a personal hearing.

But I don't see this as trying to discourage somebody who really wants to exercise their fundamental right to a hearing, from having one.

Q. So you agree this letter is designed to cut down the [131] number of claimants who request a personal hearing?

A. Well, it is designed to cut down on the number of claimants who request a personal hearing, and then don't show up for them.

MR. RAM: All right. May I have the question read back? (Question read.)

MR. RAM: I still don't think you answered that question.

Q. Referring again to Exhibit H, the sentence that begins, "First, due to the backlog of scheduled hearings," are you saying that you don't think that sentence would discourage a claimant one bit from requesting a hearing?

A. I just don't see—I think what you want me to do is answer yes or no, and the question can't be answered yes or no. That is not fair. It is misleading for me to answer yes or no, and I have tried to amplify what probably, as I understand it, is the purpose for that letter.

That letter is meant to discourage people who do not genuinely, seriously want a hearing on appeal.

It is not meant to discourage someone who does—it gets at this kind of thing—somebody who requests a hearing is scheduled for the hearing, and the case then sits at the regional office level for months awaiting the hearing. Then the date of the hearing comes and the claimant does not show up for the hearing. That is that much time that has been lost because of that.

This is not meant to discourage a claimant who wants a hearing, has it scheduled, and appears and testifies.

Q. I will keep reading from Exhibit H. The next sentence says:

[132] "Thirdly, certified statements carry as much weight as in-person testimony."

Wouldn't that sentence tend to discourage claimants from requesting a formal hearing?

A. Again, it just informs the claimant of what is indeed true: certified statements carry as much weight as in-person testimony.

Again it is a—it is the option of the claimant as to whether or not they want the hearing.

MR. NAGAN: Counsel, I believe you have copies of that exhibit.

MR. RAM: Right. I will enter the exhibit. What I have been referring to is Exhibit H to the complaint. We will mark that as the next exhibit in order, which is Exhibit No. 64.

[Whereupon, Plaintiffs' Exhibit No. 64 (Standefer Deposition), consisting of an updated letter to Mr. Reason Warehime, Jr., from T. A. Verrill, Adjudication Officer, was marked for identification.].

MR. RAM: Q. Mr. Standefer, I will again direct your attention to the sentence in the exhibit which has now been marked as Plaintiffs' Exhibit No. 64 (Standefer Deposition) where it states, "Thirdly, certified statements carry as much weight as in-person testimony."

And I will ask you, isn't that inconsistent with the figures in Plaintiffs' Exhibit No. 63 (Standefer Deposition) for disability compensation cases allowed, that show cases in which formal hearings are requested result in more allowances?

A. The figures speak for themselves.

[133] As is reflected here, where personal hearings are conducted, the claimants, in a larger percentage of cases, tend to be successful.

However, under the law, in-person testimony has the same weight as other testimony.

The law does not differentiate and indicate to anybody, any adjudicator, any official at the Board of Veterans Appeals that more weight, more credibility is to be given to face-to-face testimony.

Q. Well, it may not be written down, but in fact, don't the figures in Plaintiffs' Exhibit No. 63 (Standefer Deposition) show that you are better off going in there and in speaking to people at a formal hearing, rather than just submitting a certified statement?

A. In a broad range of cases that is true. But that does not speak to an individual case, of course.

Q. Still looking at Plaintiffs' Exhibit No. 64 (Standefer Deposition), I will read the next sentence.

"Fourthly, if you do not have new and material evidence, preferably medical, but would be merely restating previously furnished information, no change can be made based on the personal hearing alone."

Doesn't that sentence also discourage claimants from requesting formal hearings?

A. Again, I would think that anyone who genuinely wants a hearing on appeal would not be discouraged by any language in this letter.

Q. Well, Mr. Standefer, looking specifically at that line, [134] that sentence I just read, which is the last sentence in the second paragraph, doesn't that sentence say unless you have some new evidence, there is no point in a formal hearing? Isn't that what that sentence says?

A. All this says to me is that the rating board is unlikely to reverse itself.

Again, what you have to understand is the rating board members act only as hearing agents for the Board of Veterans Appeals. So whereas the—this kind of language may indicate to the claimants that they are not apt to change their minds unless new and material evidence has been submitted, this does not speak at all to what the Board of Veterans Appeals is apt to do.

Q. With reference to a personal hearing before the rating board, doesn't that last sentence which begins with the word "Fourthly," say that unless you have got some new evidence, there is no point in asking for a personal hearing in the field office?

A. Where are we now? Ask the question again.

MR. RAM: Do you want to take a break?

THE WITNESS: Yes. Let's go off the record for just a minute.

(Whereupon, a brief recess was taken.)

(Question read.)

THE WITNESS: And again, it says to me that the local rating board may not be inclined to change its mind.

It does not say there is no point in asking for a hearing on appeal.

[135] The hearing on appeal is for purposes of the Board of Veterans Appeals, and we are not addressing that point at all in this last sentence.

Q. I am talking about the personal hearing in the field office.

A. I know you are, and that is why I say it seems to [sic] that I have responded to your question.

Q. Okay. But my question was just with respect to the personal hearing in the field office, doesn't that sentence that begins with "fourthly" say there is no point in asking for a personal hearing in the field office, before the case is certified to the BVA, unless you have some new evidence?

A. Except the claimant knows that the hearing in the field office is for the purposes of making a transcript which is going to communicate to the Board of Veterans Appeals. The claimant knows that the appellate process is not trying to change the rating board's mind. The appellate—the hearing on appeal is for the purposes of—using the rating board members as agents of the Board of Veterans Appeals, and of making a transcript and getting anything into that transcript that the claimant so chooses to, that the Board of Veterans Appeals can be communicated with; can read the transcript.

The claimant knows that his right of appeal is not contingent on convincing the rating board to change their minds. He has to convince the Board of Appeals to overturn the rating board decision.

Q. What is the purpose of a personal hearing that is the subject of Plaintiffs' Exhibit No. 64 (Standefer Deposition)?

[136] A. It is to allow the claimant the opportunity, in an informal setting, to present any information, any evidence that is relevant to his claim, without being bound by exclusionary restrictive rules of evidence.

The members of the rating board then sit as agents of the Board of Veterans Appeals for administrative purposes of opening the hearing, closing the hearing, asking whatever questions may occur to them.

They are there to the extent possible to assist the claimant, not to impede him in his effort in any way.

Q. And as a result of the personal hearing in the field office, there is a transcript that goes to the BVA in D.C.; is that right?

A. That is right.

Q. Doesn't that last sentence in the first paragraph say, if you don't have new evidence, but would be merely restating previously furnished evidence, there is no point in asking for the personal hearing in the field office?

A. That is not what it says.

It says, "No change can be made based on the personal hearing alone."

It means the rating board is not inclined to make any change based on that personal hearing alone.

Q. Doesn't it also mean that the BVA is not inclined to make any change based on the personal hearing alone?

A. Of course not. There is no way that can be read that way.

Q. Where in that sentence that begins "fourthly" does it limit what it is referring to, to action taken by the field [137] office?

A. There is no explicit language that I can point to that would answer your question.

It is quite obvious, I think, to any person who would read this, that the regional office is speaking of itself alone, and

is not indicating that the Board of Veterans Appeals is not going to be able to allow the claim, or is going to be disinclined to allow the claim, based on the personal hearing alone, personal testimony given at a hearing alone.

Q. If on the basis of reading this letter which is Plaintiffs Exhibit No. 64 (Standefer Deposition), the claimant decides not to ask for a personal hearing in the field office, is he going to subsequently be able to ask for some type of formal hearing?

A. Yes.

Q. Isn't one of the types of hearings he could ask for, a hearing in the field office, to make a record for the BVA?

A. That is correct.

Q. And isn't this letter which is Plaintiffs' Exhibit No. 64 (Standefer Deposition) apt to make the claimant think that no hearing in the field office is going to make a difference with his case, unless he introduces new evidence at the hearing?

A. Well, I think the plain language would indicate just what any person reading it could gather, and that is if the claimant is there without new and material evidence, preferably medical, and is just going to restate previously furnished information, no change is apt to be made at the local rating office level.

* * * * *

[157] Q. If the BVA accepts as to every fact in the statement of the case that exception was not—that was not explicitly disagreed with by the claimant, wouldn't that prejudice the claimant's appeal?

A. I just don't know what you mean by that particular language, wouldn't that prejudice his appeal. I don't know what you mean.

Q. Wouldn't he be less likely to prevail?

A. Yes, that is true.

Q. Isn't it true that many unrepresented claimants, and many claimants represented by service organizations file one page substantive appeals that do not respond point by point to the fact in the statement of the case?

A. That is true.

* * * * *

[159] Q. Is the claimant's appeal limited to whatever issues he raises in the substantive appeal?

A. Ordinarily the Board of Veterans Appeals will assume jurisdiction only of matters that are raised in the substantive appeal.

Q. So anything not raised in the substantive appeal is waived; isn't that right?

A. Many times the Board of Veterans Appeals will take the posture that issues that are not responded to specifically in the substantive appeal, are considered dropped.

And that is also pointed out in a preliminary paragraph in our decision notice, to put the claimant on notice that if [sic] wants to pursue those matters, that he should do so at the regional office level.

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VOLUME II
DEPOSITION OF RICHARD B. STANDEFER
JUNE 16, 1983
(CAPTION OMITTED)

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[164]

Q. Isn't it true that almost none of the service organization representatives are attorneys?

A. To the best of my knowledge, that is true.

Q. And that includes the staff at the national offices, doesn't it?

A. When you say the "staff at the national offices," can you clarify precisely what you mean? Are you talking about the appeals staff that are actually headquartered and housed with the Board of Veterans Appeals in our building; or their national headquarters like over in other parts of the city in Washington?

Q. Well, let's take it one at a time. First, the appeal staff housed in your building; isn't it true that almost none of them are attorneys?

A. That is true.

Q. Isn't it true that almost none of the service organization representatives headquartered elsewhere in Washington, D.C., are attorneys?

A. Well, as far as their national organization—national [165] staff skill, I don't know. There may be some attorneys that work for the national organization's national staff. I have no knowledge about that, but I think these would not be service officers as you using that word.

Q. All right. Now, when I say service officers from now on, or service representative, I am going to mean service organization representatives who are accredited to appear before the VA.

Now, with that definition in mind, isn't it true that almost none of the service officers at the national offices are lawyers?

A. To the best of my knowledge, that is a true statement.

Q. Isn't it true that almost none of the service officers in the regional offices are lawyers?

A. To the best of my knowledge, that is true.

Q. Isn't it true that almost none of the service officers at the local offices are lawyers?

A. To the best of my knowledge, true.

* * * * *

[166] Q. Isn't it true that in general the claimant does not meet his Washington, D.C., service representative until shortly before the hearing?

A. To the best of my knowledge, I think that is true.

* * * * *

[168] Q. And isn't it true that in those ten or so times the claimant did not even meet his representative at all?

A. I have no idea. I would suspect not.

Q. You would suspect that he did not?

A. That he did not meet the representative.

Q. Are you drawing a distinction between a formal hearing and some other type of hearing?

A. Yes. Isn't that what we are talking about; a formal hearing?

Q. Okay. What other type of hearing is there?

A. Well, that is the only kind of personal appearance that is—where either the service officer comes and talks directly, face-to-face in a formal hearing situation where the presiding members call the hearing to order and so forth. A formal situation is what I am talking about.

I am not talking about—and I trust you are not talking about a—about what we call an informal hearing memorandum, which is nothing but a written document.

Q. Is an informal hearing memorandum different from the statement of the accredited representative?

A. No, it would essentially be the same.

Q. It would be the same?

A. Right.

[169] Q. And it would be a one or two page written document?

A. That is correct.

Q. And what percentage of appeals are handled simply through an informal hearing memorandum?

A. The vast majority.

Q. Isn't it true that in cases in which the appeal is handled simply by an informal hearing memorandum, that the claimant often does not meet his service representative at all?

A. That is true.

* * * * *

[170] Q. But isn't it true that almost always it is the case that the service representative does not gather evidence?

A. That is not the service officer's primary function. That is correct.

Most of the time they don't go out and try to develop the evidence on their own.

* * * * *

[171] Q. In most cases—in almost all cases, the record will consist of the claimant's service history and his service medical history; isn't that correct?

A. That is correct.

Q. And even in radiation cases, it is almost always the case that the record will consist of the claimant's service medical records and service history and nothing else; isn't that correct?

A. Almost never is a claimant's folder, that is the appellate record that the Board of Veterans Appeals examines, almost never is it that restricted—is the evidence restricted to those two items you have mentioned.

Almost always there is other medical evidence involved, assuming it is a medical case that we are dealing with.

Almost always their postservice Veterans Administration examination and medical records, almost always their private medical records—reports and records.

* * * * *

[182] Q. Isn't it true that the briefs submitted by attorneys tend to be longer than the briefs submitted by service representatives?

A. I think that is a true statement.

Q. Isn't it true that the briefs submitted by attorneys tend to cite to authority much more frequently than the briefs submitted by service representatives?

A. I would say that is true.

Q. Isn't it true, that the one page handwritten brief is standard practice among service organizations?

A. One or two pages, that is true.

Q. Isn't it true that the substantive appeal submitted by the service representative is typically only one page long?

A. Generally speaking, the substantive appeal is prepared by the claimant himself. In fact, it must be signed by the claimant.

Aren't you talking about the informal hearing memorandum?

[183] Q. Well, let's keep with the substantive appeal for a second.

Isn't it true that in the vast majority of cases, the claimant filing a substantive appeal is represented by a service representative?

A. That is true.

Q. Isn't it true that it is part of the obligation of the service representative to counsel the claimant in filling out the substantive appeal?

A. That is true.

Q. Isn't it true that 38 DFC, Section 19.145a states that the claimant is presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken?

A. That is true. That is not all that regulation, but what you have designated as the pertinent part, that is true.

Q. Isn't it true that either the service representative or the veteran,can sign the substantive appeal?

A. I think that is true that the service representative, in lieu of the veteran, can sign it.

Q. Isn't it true that the substantive appeal is often filled out and signed by the service representative?

A. I am not sure how often that is done.

In my experience most of the time the claimant has signed the 1-9, and whether or not the service officer has supplied the language that goes into it or not, I just don't know.

Q. Is it usually handwritten, the substantive appeal?

A. I would say in the majority of the cases it is.

In the cases that I have seen, I am talking about.

[184] Q. Isn't it true that in addition to the substantive appeal and the statement of an accredited representative, that no other briefs are filed in an appeal?

A. That is correct. The substantive appeal, and the statement of an accredited representative, and then the informal hearing memorandum prepared by the national appeals staffs.

Q. Well, isn't the informal hearing memorandum the same as the statement of an accredited representative?

A. Well, it is my understanding that the local service officers put in a—what is commonly called a statement of an accredited representative, which is a VA form 646, and in addition to that, then the national appeals staff, and again I am talking about the designated—the large service organizations, the VFW, the DAV, the American Legion, the Amvets, Military Order of the Purple Heart—I may have left one out—but also, in each and every case, will prepare what is called an informal hearing memorandum, which supplements the statement of the accredited representative, that having been prepared at the local level.

Q. Isn't it true that the informal hearing memorandum is almost always one or two pages.

A. That is correct.

Q. Isn't it true that the informal hearing memorandum almost never cites to authority?

A. That is correct.

Let me revise that: almost never. Most of the time it does not. From time to time, informal hearing memoranda do cite authority.

[185] Q. Once in a while—once in a great while?

A. We are talking about an infrequent occurrence, that is right.

* * * * *

[188] Q. Isn't the use of experts by service officers very rare?

A. Yes.

* * * * *

[201] Q. Could you enumerate for me the types of disability compensation cases which include complex matters and complex issues?

A. Just about any issue that comes before the Board of Veterans Appeals in the medical field; that is, a medical disability issue could be either very simple or very complex.

It just depends on the varying facts and circumstances of that individual case.

So I can't really give you a list and say, well, every multiple sclerosis case is complex; every radiation exposure case is complex; conversely, every club foot case is very simple.

One cannot make that statement. It depends on the facts and circumstances of each individual case, as to whether it can be called complex or simple.

* * * * *

[209] Q. Isn't it true that about in 11 percent of the cases which appear before the BVA the veteran is represented only by himself?

A. I think that is approximately the correct figure. That sounds about right.

I don't know exactly, but I would say that it is in that neighborhood.

Q. Wouldn't a claimant be more likely to prevail if he retained an attorney, rather than representing himself?

A. I think so. And I think probably the statistics would bear that out, because represented people tend to have a higher allowance rate than nonrepresented people. So I would say yes.

* * * * *

Q. Isn't it true that there is not sufficient free legal representation available for all of the claimants who desire legal representation?

* * * * *

THE WITNESS: Before the Board of Veterans Appeals or [210] generally?

MR. RAM: Q. Generally.

A. All right. I am with you.

Q. Isn't it true that there is no sufficient free legal representation for all claimants who desire legal representation?

A. To the best of my knowledge, that is true.

But I have made no study of that situation. And I think, you know, just as an informed citizen, that my understanding is that that is right.

Q. And isn't it true that about 11 percent of claimants end up representing themselves before the BVA?

A. That is approximately correct.

Q. And isn't it true that claimants who are represented by attorneys are more successful than claimants who represent themselves before the BVA?

A. I think is correct.

* * * * *

[213] Q. In your opinion, is there any justification at all for the statute which limits to $10 the amount a veteran can pay an attorney to represent him before the VA?

A. That is a political question. It is something, you know, that has been enacted that I certainly have had no input in whatever.

As an employee of the Veterans Administration, I am, you know, sworn to work within that system, and there is no way I can change it.

I don't—do you want me to give my opinion on it?

[214] Q. That is what I am asking for.

* * * * *

MR. RAM: Q. The question is:

In your opinion, is there any justification at all for the $10 limitation?

A. Well, it protects the—the rationale obviously for that rule is it conserves the corpus of the award for the claimant and the claimant alone, and excludes the attorney from it.

Q. In your opinion, is there any other justification for the $10 limitation?

A. I can't think of any. There may be some.

This is just right off the top of my head—I have not given any deep thought to any of this—the reason is that

the system is the system, and I work within it as an employee of the federal government.

Q. The justification that you just gave me has no applicability at all to claims that are denied; isn't that correct?

A. That is my understanding; that the $10 would apply only in an allowed claim, and it would come out of the award.

Q. Well, my point is that isn't it true that if the claim is denied, there is no corpus to protect?

A. True. yes.

[215] Q. So in the case of claims that are lost, there is no justification at all for the $10 limitation, is there?

A. You have said it all, when you say a claim is denied and there is no corpus to protect. That is a true statement. And I can't say it any better than that.

Now, if you are looking for or asking a different question, would you please ask it again? I just didn't understand the nuance there.

MR. RAM: Would you read it back, please?

(Question read.)

THE WITNESS: The justification for—the rationale for the $10 fee limitation is to protect the corpus of the award, and make sure the attorney does not share in that award in any way, other than to the extent of $10.

If the claim is denied, like you say, there is no award to protect. I agree with that statement.

* * * * *

[218] Q. Before the break, I was asking you what your opinion was as to the justification, if any, for the $10 fee limitation.

I think you gave two justifications. You said, first, it could protect the corpus of the amount for the claimant in cases in which the claimant does manage to prevail; and secondly, you said it could keep the claimant from having to pay a fee to his attorney in cases in which the claimant does not prevail; is that correct?

A. That is correct.

Q. And I think we agreed that the first reason of protecting the corpus is inapplicable to a case in which the claimant does not prevail; is that correct?

A. That is correct.

Q. Isn't it true that the second rationale, i.e., preventing losing claimants from having to pay attorneys' fees could be just as easily accomplished by a system in which claimants retain attorneys on a contingency fee basis?

A. I suppose. I understand a contingency fee basis is where the claimant would pay absolutely nothing—nothing whatsoever, unless the claim were won, and then I would suppose that is right.

Q. And in your opinion, other than the two justifications that you have enumerated, is there any other rationale for the $10 fee limitation?

[219] A. I have been unable to think of others.

Q. Are there any instances about which you have heard in which a veteran has been taken advantage of by an unscrupulous attorney?

A. I can't state an instance of that.

Q. Have you ever heard of such an instance?

A. No, no.

* * * * *

[227] Q. Isn't it often difficult to determine, with any amount of precision, the degree of exposure that the veteran has suffered in a radiation case?

A. Yes.

Q. Isn't it often the case that no film badges were issued or worn at the various atomic tests?

A. Yes.

Q. And isn't it a difficult problem to try to reconstruct sometimes 25 to 30 years after the fact, the exact dose that a veteran received?

A. Yes.

Q. And isn't it true that to the extent that records maintained 30 years ago were inadequate, you are simply stuck with them?

A. Often that is the case.

Q. And isn't it true, if a claimant claims he was bathing or swimming in radiated water, you simply have no way to determine the degree of exposure?

A. That often is the case. We have only his word for what has happened about what has taken place; what he

can tell us about bathing and maybe what he has eaten, ingested or inhaled, and it is a very difficult matter from what he is able to remember about it, to get any kind of scientific estimation or reconstruction, if you will, as to what the degree of gamma or beta radiation exposure may have been, yes.

[229] Q. But neither the field office nor the BVA made any attempt to secure data on alpha radiation or beta radiation; isn't that correct?

A. It is my understanding, of course, the only place or official source we have of securing any radiation exposure data is from the Defense Nuclear Agency.

I think efforts are underway for them, for the Defense Nuclear Agency to reconstruct beta radiation exposure.

I think information is not available though from the Defense Nuclear Agency as to alpha, and as I said before, the Board of Veterans Appeals is a quasi judicial body. We are not in the dose reconstruction business. We don't have that capability at all.

Q. And the field office would not go to any source outside of the defense nuclear agency to obtain exposure data; isn't that correct?

A. That is correct.

Q. If a claimant said he was bathing or swimming in radiated water, how would you determine his exposure?

A. I have said we have no way to undertake any kind of reconstruction. We have no formula to apply.

Q. So you would not know whether he had been—you just wouldn't know the degree of exposure or not, would you?

A. That is right. We would only have his word for the fact that he had bathed, eaten, inhaled, et cetera.

Q. And it would be up to the claimant to provide some evidence of exposure; isn't that correct?

A. That is correct.

[230] Q. Isn't it true that the claimant's service records are often lost or destroyed?

A. It happens. Of course, there was the infamous fire at the Record Center in approximately 1973, and a substantial number of World War II and I think Korean conflict veterans' records were, at least in part, destroyed. So it does happen.

Whether you could characterize that as being often, I think that is a—too strong a statement.

Q. But a substantial number were destroyed.

A. That is correct.

Q. And does that not even further complicate the process of determining exposure in a radiation case?

A. To the extent that veterans from those periods of times records were destroyed in that fire, that is a true statement.

And I don't know precisely what time frame of those veterans we are talking about who were involved in what we call fire-related—that fire-related service record situation.

Q. But as to those veterans, it does make the case more difficult, doesn't it?

A. Of course. Of course.

* * * * *

[231] Q. Isn't it also true that there are no records of exposure to Agent Orange?

A. That is true. No efforts were made to monitor exposure to Agent Orange.

* * * * *

[249] MR. RAM: Q. Isn't it also true that no effort is made in atomic veteran cases to cross-reference the claims of veterans who have suffered the similar exposure?

A. Cross-reference how, and by whom?

Q. Well, let's start with the BVA.

The BVA gets a claim from an atomic veteran who was on, say, the FULTON, at Operation Crossroads, and it makes no attempt, does it, to review the claims folders to see whether other veterans on the FULTON have filed atomic veteran claims?

A. No, you are right. No effort of that nature is made.

Q. Nor is any such effort made by the VA field office; isn't that correct?

A. To the best of my knowledge, that is correct.

Q. So if somebody is on the USS FULTON at Operation Crossroads and gets leukemia 30 years later and brings a case and prevails, and then the next day his buddy, who

was right next to him on the USS FULTON at Operation Crossroads gets leukemia and brings his own case, the VA will not look at all to the first case in deciding the second one; isn't that correct?

A. I can speak only to the practice of the Board of Veterans Appeals. I am not sure what the field offices' approach to that would be.

But of course, one of the reasons we have kept the radiation exposure cases to two sections—confined them to two sections is so that people who are similarly situated will be presented the same way, and attorneys and board members who [250] work at atomic veterans cases are under an affirmative obligation to be aware of the kind of cases that have been allowed in the past.

So that when a similar case comes to our attention, it can be handled similarly, or there would be a good reason for distinguishing it on its facts.

Q. But the evidence of record in the first atomic veteran's case that I described would not be considered in the second atomic veteran's case; isn't that correct?

A. Yes, that is generally a correct statement.

Q. So if the veteran who brought the first atomic veteran's case had gone out and gotten expert medical testimony, that would not be considered in the second atomic veteran's case; isn't that correct?

A. Well, I am not sure that that is correct, because I understand medical opinions in similar cases have been considered in other cases.

I have never personally seen an instance though where an expert opinion in what veteran's case has been used in another case on the—at the Board's own motion.

Q. Isn't the BVA compelled to follow the regulation that provides conclusions reached in individual cases will not be followed as precedents?

A. That is correct.

Q. Does the VA make any effort at all to determine how many claims are made by the participants in a particular test blast?

A. No.

Q. In an atomic veteran case, does the VA make any attempt to [251] interview fellow servicemen of the veteran?

A. Ordinarily the burden of that falls to the veteran.

In most cases, the VA would not actually send its representatives out to interview fellow servicemen.

That could happen if the Board of Veterans Appeals wanted that done, we could order it done and the field station would have the capability of doing that, but that would not be the usual case.

Q. Are you aware of any instances in which the VA has interviewed a fellow serviceman of an atomic veteran?

A. I can't recall a specific instance of that.

* * * * *

[258] Q. You said that staff attorneys can ask questions of the claimant.

A. At the discretion of the chief member.

* * * * *

[259] Q. But isn't it true that the answers given by the claimant to the staff attorney's questions at the hearing can be used as part of the basis for denial?

A. That is true.

* * * * *

[263] Q. Would you look at the first page of Plaintiffs' Exhibit No. 74 (Standefer Deposition), which is a chart that we have compiled based on the hearing data sheets that are attached to it.

I think it is self-explanatory, which shows that the average amount of a BVA hearing from the period of January 1982 to April 1983 was a little under 40 minutes, 39.49 minutes. Does that sound right to you?

A. Yes.

* * * * *

[267] Q. So there is only a personal hearing before the Board in three out of 40 cases?

A. That would be a rough truism, yes.

* * * * *

[269] Q. Isn't it true that the instances in which anyone other than the claimant testifies at BVA personal hearings are infrequent?

A. Yes.

* * * * *

[270] Q. Isn't it true that statements from expert witnesses are only infrequently submitted?

A. That I think is true.

Expert witnesses appear either personally or in writing, if you will, very infrequently.

Q. And isn't it also true that the occasions on which experts are—or experts testify in person at the BVA personal hearings are even more infrequent?

A. That is right.

Q. In what percentage of personal hearings in radiation cases are expert witnesses called to testify?

A. Very infrequently.

* * * * *

[276] Q. So basic legal entitlement would essentially mean that the claimant has a meritorious claim for compensation; isn't that correct?

A. True.

Q. So the BVA takes the position that a claimant who has a meritorious claim to service connected death and disability compensation, has a basic legal entitlement to that compensation; isn't that correct?

A. Legal entitlement—would you say that again?

(Question read.)

[277] THE WITNESS: If one can meet the elements for the establishment of service connection, if you can demonstrate in that particular instance that a disease or injury has arisen coincident with service, then there is basic legal entitlement to a grant of service connection and a monetary award, if the disability meets the schedule for rating disabilities.

That would be an example of basic legal entitlement.

* * * * *

MR RAM: Q. So if a claimant meets the requirements of the statute for death compensation or disability compensation, he is legally entitled to that.

A. True.

Q. I would like you to enumerate all the different sources that comprise the law by which death and disability compensation claims are governed.

And by that I mean to include the statute, the regulations, the manuals, the circulars, the interim issues of the program guide, the appellate regulation policy procedures—could you enumerate all the different sources for me that comprise the law in the death and disability compensation cases?

A. I will be glad to, to the extent that I can, but I will have to make it perfectly clear that there will be a demarcation between the things which are regulatory, that is absolutely [278] binding on the Board of Veterans Appeals, and the local level adjudicators; and those things which are instructive, persuasive maybe, but not absolutely binding upon them.

Let me start with the regulatory matters first. Of course, the statutory law is binding. This is on both the field and the Board of Veterans Appeals. I am talking about the field adjudicators and the Board of Veterans Appeals.

The regulations of the Veterans Administration are binding on each. The precedent principles of the general counsel are binding on each.

And those with respect to the Board of Veterans Appeals are the only thing that are binding or even persuasive are just those three—the three criteria I have mentioned, embodied or found in those sources of material.

Q. Well, let me stop you there.

Isn't the BVA also bound by the Board of Veterans Appeal Manual?

A. No. That is not regulatory. That is instructive, but not regulatory.

It does not bind any member of the Board.

Q. Who promulgated the BVA appeals manual?

A. The chairman of the Board of Veterans Appeals.

Q. And the BVA is not bound by the BVA manual, a copy of which is marked as Plaintiffs' Exhibit No. 45 (Standefer Deposition)?

A. Most of the matters in there pertain only to administrative things—format matters.

There are a few sections, for example, there is a section [279] on appellate guidelines that gives some broad guidelines as to the adjudication of certain cases.

But again, none of that is absolutely binding on any member of the Board; that is, a member of the Board in an appropriate case, for good reason, can enter a decision that deviates from instructions in that manual as format or even contrary to the appellate guidelines.

Q. The appellate guidelines are a section of the BVA manual?

A. That is right.

Q. Do you recall offhand which section they are?

A. I will have to look.

Q. On page 1-i of Plaintiffs' Exhibit No. 45 (Standefer Deposition) is a table of contents—well, that is just for Section 1, I guess.

A. Chapter 14 sets forth appellate guidelines, and that is at page 14-i, et seq.

Q. Referring to Plaintiffs' Exhibit No. 45 (Standefer Deposition)?

A. Right; referring to Exhibit 45. And just looking at the table of contents then—

Q. I'm sorry. What page are you at?

A. It is Chapter 14. It is going to be right at the very end of your publication—maybe the last full section.

Q. All right. Chapter 14 contains the appellate guidelines?

A. Right.

Q. And the BVA is not bound by the appellate guidelines?

A. Well, what I am saying is that members of the Board, the attorneys staff of the board is under an obligation to know [280] what is contained in these appellate guidelines, but that is all this information is—just guidelines.

Q. So if a Board member does not want to follow these appellate guidelines, he doesn't have to?

A. That's right, in an appropriate case, if there are equities—if there are other extenuating circumstances that would make for a rational base for a different approach,

then he enters that decision and no one can say that decision is clearly and unmistakably erroneous because the appellate guidelines had not been adhered to, is what I am saying.

These are not regulatory.

* * * * *

[282] Q. Are there appellate procedures for the Board sections apart from what you have designated as appellate guidelines?

A. Well, to the extent those are defined in MBVA-1 that is your Exhibit No. 45—

Q. In addition to the BVA manual, there is also a manual for the field office, is there not?

A. Yes.

Q. And what is that called?

A. There are at least two.

One is designated M21-1. That is a Department of Veterans Benefits publication and the other is—

* * * * *

Q. Can we call the VA adjudication manual?

A. That is fine with me.

Q. And that also is not binding on the BVA.

A. It is not.

Q. Is it binding on the field offices?

[283] A. Again, this is not regulatory and having never worked in a field office, I don't know how persuasive it is.

I can't tell you in how many instances—I have no idea—in how many instances there is any deviation from its provisions, because I don't know what all is in it.

But I do know that it is not regulatory. It is not part of the law or the regulations.

Q. You mentioned another manual.

A. That is right. And that is the so-called program guide, which is a manual labeled "PG"—and I am not sure exactly what the numerical designation is—but in common parlance, it is well known by all employees of the adjuciation division of the Veterans Administration as the program guide.

Q. And that is not binding either?

A. And that is not binding either.
Q. And are there circulars?
A. There are circulars.
Q. And those are separate from everything we have talked about so far?
A. Yes.
Q. And those are not binding either?
A. No.
Q. Are there also interim issues or are those interim issues simply part of the manuals that we have discussed?
A. There are interim issues, technical bulletins.
Q. There are interim issues separate from anything we have talked about so far?
A. That is right.
[284] Q. And those are not binding either?
A. No.
Q. And there are technical bulletins?
A. That is correct.
Q. And those are not binding?
A. No.
Q. Have we left anything out?
A. I can't think of a thing.
Q. Are there also VA regulations as opposed to what is contained in 38 CFR?
A. The so-called VA regulations are all embodied in Title 38 of the Code of Federal Regulations.

Now, there is a separate publication of what are called VA regulations, but they are all contained under different numerical designations, word for word in the Code of Federal Regulations. They are just bound in different volumes.
Q. I would like to go back now to the three sources of law that you said are binding, which was the statutory law, the VA regulations and the precedent opinions of the general counsel.

Is that a correct enumeration?
A. Yes.
Q. Are the precedent opinions of the general counsel published?
A. They were, but they--they are not published as such now.

They are not in bound volumes now.

They are available in looseleaf form and housed in the office of the general counsel.
Q. And that is in Washington, D.C.?
[285] A. Correct.
Q. Are they available anywhere else?
A. I think probably they are available—I just am not sure whether they are available in the offices of the district counsel of the veterans administration or not.
Q. Are they made available to claimants?
A. Ordinarily not.
Q. Okay, now, I would like to turn to the various sources of—I guess what you would call just guidance, which consists of the BVA appeals manual, which includes the chapter on appellate guidelines, the BVA adjudication manual, the program guide, the circulars, the interim issues and the technical bulletins.

Is that enumeration correct?
A. That is correct.
Q. Is the BVA manual made available to claimants?
A. Generally no, but any claimant who would request, you know, any information from the MBVA-1, you know, could have that information.

But when a claim comes to the Board of Veterans Appeals and an appeal comes to the Board of Veterans Appeals, quite obviously we do not, as a matter of standard practice, send a copy of the MBVA-1 to them.
Q. Is the VA adjudication manual made available to a claimant?
A. And the same answer would apply, no.
Q. Is the program guide made available to the claimant?
A. The same answer there would apply, too; no.
Q. How many pages, more or less, are in the program guide?
A. It would be approximately the same length as what you are [286] calling the VA adjudication manual.

The MBVA-1, more or less, about that same length.
Q. So it would be about an inch thick, maybe more?

A. Well, the way you have it, generally when I have seen it, it is in looseleaf form, and it is two big looseleaf binders.

Q. All right. And the circulars are not made available to the claimant either.

A. No.

Q. And how lengthy are all the circulars put together?

A. I have no idea.

Q. Quite a number of them?

A. Quite a number of them.

Q. And there are quite a number of interim issues also.

A. That is correct.

Q. And those are not made available to claimants?

A. No.

Q. And there are quite a number of technical bulletins.

A. That is right.

Q. And those are not made available to claimants.

A. That is also correct.

Q. Is it fair to say that there is a vast amount of material, both binding and persuasive, that governs VA adjudication of service connected claims?

A. There is a substantial amount of information, yes.

I don't know if we want to quibble about substantial—vast—but let me say yes.

* * * * *

[290] Q. At the BVA level, is it not common for a resolution of a claim to turn on the application of the law to the facts?

A. Well, of course, every Board of Veterans Appeals decision involves the application of law to the facts.

But most of the time, the matters that are very much at issue that determine the claim are questions of fact rather than questions of the interpretation of the law.

Q. So it is seldom in a case that a service representative will raise an issue as to what the correct rule of law should be?

A. That is correct, for the reasons I have just stated.

Often that is not material to the outcome of the claim at all.

Q. In fact, the service representative hardly ever raises the question of what the applicable rule of law should be at the BVA stage.

A. That is right, hardly ever is that raised by the service representative, because generally that is not a matter that is material to the outcome of the case.

[291] Q. In fact, the service representatives concentrate exclusively on the question of fact, and virtually never raise questions of law on appeal; isn't that correct?

A. Seldom are questions of law raised.

Q. In addition to the three regulatory sources that you have enumerated, and the six persuasive sources that you have enumerated, aren't there also prior decisions of the BVA?

A. That is correct.

Q. And are those binding?

A. No; and as we have discussed earlier, the Board does not follow a system of stardie decisive as such, s-t-a-r-d-i-e—decisions of the Board of Veterans Appeals as such, have no precedent value.

However, the Board does try very hard to maintain, in the interest of fairness, some consistency so that claimants similarly situated are treated the same way with respect to the outcome of their claims and what I have said is something that is entirely different and distinct from previous decisions of the Board having precedent value.

Q. So the sources that are persuasive on the VA adjudication system, in addition to the MBVA manual, the VA adjudication manual, the program guide, the circulars and the interim guide and the technical bulletins would also include prior BVA decisions; isn't that correct?

A. Right.

Q. And the digest of those decisions is kept by the BVA.

A. That is correct.

Q. On microfiche in Washington, D.C.

[292] A. That is correct.

Q. And it is not otherwise published.

A. That is correct.

Q. And not othewise made available to appellants.

A. That is correct.

* * * * *

[295] Q. You find that most attorneys who are appearing before the Board have not had much experience in appearing before the VA before?

A. That is correct.

Q. Are they often just doing it as a favor for a friend or relative?

A. Correct.

* * * * *

[299] MR. RAM: Q. So in fiscal year 1982, there were 1,328 central office hearings, and 12 or 14 service officers handled 95 percent of them; is that accurate?

A. More or less.

* * * * *

[300] Q. I think you said that 12 to 14 service officers handled 95 percent of the personal hearings before the Board; isn't that correct, in D.C.—well, it is on the record, anyway.

What I am getting at now is, do the same 12 to 14 service officers who handle 95 percent of the cases in which there is a personal hearing before the BVA in Washington, D.C., also handle 95 percent of the other cases in which there is no personal hearing?

A. And that would be true, too, yes.

* * * * *

[304] Q. Isn't it true that an attorney is often brought into a service connection case only after the claimant has lost at the field office level where he was represented by a service representative?

A. I think that is a true statement.

Q. How many $10 attorney fee awards are you aware of?

A. I can't cite you chapter or verse.

Q. Can you remember one?

A. Nor can I recall one.

Q. Are you aware of any requests?

A. No, I am not.

Q. Isn't it true that many of the VA regulations in Title 38 of the Code of Federal Regualtions are difficult for non-lawyers to understand?

A. Some of them are.

Q. Isn't it true that many of them are complex?

A. Some of them are.

* * * * *

[307] Q. Say there is a service officer who has had experience in working with VA regulations, and there is also an attorney who has had a similar amount of experience in working with VA regulations but has also gone to law school.

Wouldn't it be generally true that the attorney will be better because of that added training at interpreting the regulations?

A. Probably so. The attorney probably would be better.

This does not imply though that the service officer would be inadequate.

Q. But the attorney would be better.

A. I think that is fair.

Q. How many service organization representatives use the Title 38 of the CFR regularly?

[308] A. I have no way of knowing that.

Q. Isn't it true that service officers' briefs hardly ever contain cites to Title 38 of the Code of Federal Regulations?

A. Hardly ever, I think again is too strong a statement.

In the majority of cases, they do not. Many, many times, a citation to 38 CFR, 3.102 may be added. Certainly the provisions that come up on almost each and every case may be cited.

But this again is not what we are talking about. That would be—pro forma, so to speak.

So what you are saying is essentially true, except your language the two words which you have used which—and I think that is too strong—I would just say often certain of the service officers' hearing memoranda do not contain citations to the Code of Federal Regulations.

Q. Or to any other authority, for that matter.

A. That is right.

Q. Would you look again at the BVA manual, Plaintiffs' Exhibit No. 45 (Standefer Deposition), and at page 6-4, Section 6.09b(5), Opinions of Legal Nature, which states, "It is not necessary to refer opinions of a legal nature from another VA office such as opinions of the general counsel, to the service organizations."

Do you know what the reason for that rule is?

A. Opinions of the—when the Board of Veterans Appeals seeks a legal opinion from the general counsel, the Board of Veterans Appeals considers that as just that, an opinion. It is free to accept or reject it.

[309] This is not—this is no reference to a precedent opinion of general counsel, which is binding on the Board.

Q. But it would be persuasive on the Board, would it not?

A. Yes, it would be persuasive.

Q. Why wouldn't you want the claimant to know what the general counsel's opinion was?

A. Just because it is not binding. It is not considered necessary to submit it to them.

Q. Wouldn't it be helpful to the claimant to see what the opinion of the general counsel is?

A. It might be.

Q. Isn't this rule inconsistent with the notion of the VA as a nonadversarial system?

A. No, it is not. I don't think there is any inconsistency in this and the nonadversary nature of the Veterans Administration at all.

Q. Even though you are withholding information from the claimant that might be helpful to him?

A. Well, the information might or might not be helpful to him.

The opinion of general counsel might be to deny the claim.

Q. Well, even in this case, at least the claimant would know the reason why his claim might be denied, and he might be able to bring up factual evidence, or make a legal argument in opposition; isn't that true?

A. It might be true in an appropriate case.

* * * * *

[323] Q. Is there any formal policing mechanism at all to assure the quality of representation provided by service officers?

A. As such, no.

Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence.

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VOLUME I
DEPOSITION OF THOMAS A. VERRILL
MAY 3, 1983
(CAPTION OMITTED)

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[3] * * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Would you please state your full name for the record.

A. Thomas A. Verrill.

* * * * *

MR. ERSPAMER: Q. Mr. Verrill, what is your official title?

* * * * *

[4] THE WITNESS: Adjudication officer.

MR. ERSPAMER: Q. And can you briefly describe the duties and responsibilities and functions of an adjudication officer with the Veterans Administration.

A. I have supervisory responsibility over a Claims Processing Division. The claims that are involved are all those relating to veterans' benefits, monetary benefit. There's a few minor benefits that don't involve money, but primarily, it's the large benefit program.

I have a large and varied organization under me which includes people from Grade 2 to Grade 14. And the majority of my time is devoted to organizational and supervisory matters, personnel matters, but I do have the final technical authority of interpreting VA regulations, procedural directives subject to appeal by the claimant with the exception of the substantive decisions of the Rating Board.

* * * * *

[5] Q. Approximately how many VA employees are under your supervision?

A. Right now, about 190. We may have lost somebody today or yesterday. It's very close to 190.

* * * * *

[7] Q. Now, I take it from the sketch that you began your employment with the Veterans Administration in 1965?

A. Yes.

Q. And you've worked for the Veterans Administration ever since?

A. Yes.

Q. And you've worked in various offices of the Veterans Administration throughout the country?

A. Yes.

Q. And has your work been primarily in the area of adjudication of Veterans Administration claims throughout that period?

A. Wholely.

* * * * *

[23] Q. In developing a death and disability compensation claim in the atomic veteran area, do you, as a matter of practice, communicate with other regional office levels for--with regard to obtaining information as to other similarly situated veterans?

A. No.

* * * * *

Q. To clarify the situation, let me give you a little example. Maybe it would be more understandable. You have an individual who files a claim with your office who's at, let's say, Operation Crossroads, was on a certain ship. Let's say the PILOTFISH. He claims radiation exposure. Would it be the practice locally to communicate with other regional offices to determine exposure information or other information with regard to similar type of claim advanced to the other regional offices and the information that they have secured in support of that particular claim?

A. No.

Q. And would you, as a matter of practice, review the claims folders within the Northern California regional office to see, in the same situation, whether similar claims from this, let's say, Operation Crossroads, the PILOTFISH, were of file?

A. No.

* * * * *

[30] MR. ERSPAMER: Q. Are you aware of any claims from the San Francisco regional office that are atomic radi-

ation claims that have been granted by the Board of Veterans Appeals?

A. No.

Q. And you're aware, are you not, that, in general, a very, very small percentage of the atomic veteran claims nation-wide have been granted by the Board of Veterans Appeals?

A. That's right.

* * * * *

A. I don't have a figure.

Q. And are you aware of any claims that were granted locally by the—this regional office for service-connected death or disability involving atomic radiation exposure?

A. I'm not aware of any.

Q. And you're aware, are you not, of a substantial number of claims locally have been denied, that such claims have been denied locally?

A. Yes.

* * * * *

[36] Q. And what about—Are you aware of any instances in which the regional office has used an independent doctor or obtained an independent medical opinion with regard to an atomic radiation case?

A. That would be done at the central office level. No, we have not, locally. We would not, locally.

Q. And are you aware of any case that the central office, with respect to one of the claims pending in the San Francisco office, has done so?

A. No.

* * * * *

[53] Q. Okay. Now, putting aside the gamma exposure, do you make any effort to assess exposure from other sources, for instance, inhalation, ingestion, and radiation from sources other than gamma radiation such as alpha emitters and other [54] types of radiation?

A. No. It's not available, to my knowledge, generally.

Q. Well, the only information as to those sources that you might be able to—well, is readily accessible is from the claimant, for instance, or ingestion or, for instance, bathing or swimming in radiated waters, and so on?

A. He wouldn't have any way of determining what exposure he had had, if any.

Q. Right. He'd have no way of determining the exact amount of exposure, but he—

A. Or even if there was exposure.

Q. Well, if I understand you correctly, are you saying that if a soldier was assigned to pick up test instruments from a ship operating at Operation Crossroads at the Bikini Toll, for example, in 1946, and was instructed to go aboard a ship that was radiated right after the blast, that he couldn't testify that he was exposed to radiation?

A. He could testify, but not as to the amount of exposure.

Q. Right. Many of the people didn't have film badges; is that correct?

A. That's right. That's right.

Q. And it's a difficult problem, isn't it, to try to reconstruct it, though, sometimes 25, 30 years after the fact, to reconstruct the exact dose of the radiation that the veteran received; isn't that correct?

A. They're not reconstructing 35 years after the fact. What they do, as I understand it, they take what evidence was gathered at the time and analyze it maybe 30 years later. [55] But, for example, they will have a series of readings from individual film badges and they'll have the composit reading and say that this is the probable exposure. That's the extent of the exactness of it.

Q. And to the extent that the records that were maintained 30 years ago were inadequate, you're stuck with it?

A. That is the truth, yes.

* * * * *

Q. And has the central office made available to you the [56] copies of the papers of Colonel Warren, who was the chief medical officer present at Operation Crossroads, for example?

A. Not to my knowledge.

Q. Are you aware of what I'm referring to?

A. Not really.

Q. Are you familiar with who Stafford Warren is? He was chie of the radiological safety section at Operation Crossroads.

A. No.

Q. So I take it you're not aware that his personal papers regarding Operation Crossroads show that the tolerance limits of Bikini were actually 5,000 times higher than the allowable limit of sent by the Nuclear Regulatory Commission at the time?

A. I don't recall reading it.

* * * * *

Q. Have you—Are you aware of any instance in the local level in which you—the regional office has specifically requested information as to other participants in a particular test shot and the incidence of reported claims, incidence of claims with regard to that specific shot?

A. No.

Q. You're required, are you not, by the regulations promulgated by the Veterans Administration to treat each

* * * * *

[57] Q. Now, I'd like to get into a little bit of a new area, and just generally, as to how the case load is handled on the regional office level. Can you explain generally how employees are given credit for time spent on adjudicating and handling and investigating claims?

A. We have a work measurement system which assigns, based on studies that are performed periodically, the average amount of time that should be devoted to a particular type of claim. Then if you have that type of claim and you take less time, you gain a little, if you take more time, you lose what you gained in the case before, but it's supposed to be an average, and that's a nationally established work measurement schedule.

Q. Now, you say on particular types of claims. Are you talking about initial claims as opposed to renewed claims? Or what types of categories have been set up?

A. We have quite a few categories. They are established by work product. Generally, it runs initial claim, service-connected, initial claim, non-service-connected, review claim.

* * * * *

[58] THE WITNESS: That's a general category without respect to the service-connected issue.

Claims for dependants. Then we have initial service-connected death claims and initial non-service-connected death claims. We have claims based on changes in income for income dependent programs. We have a work measurement schedule for burial claims in general. We have a work product for appeals.

MR. ERSPMAER: Q. When you say "work product," what are you referring to?

A. Work measurement ratio or grant, credit, a work credit for appeals, all these other breakdowns.

Q. Can you tell me what the—what the work credit is for the initial claims for service-connected disability?

A. What the work credit is?

Q. Yes.

A. For the amount of time that's —Well, they get very precise, down to the hundredth.

Q. Well, just roughly, let's say to the nearest hour.

A. Two hours—I would say two hours for an initial claim. It's within that—within a few points of two hours.

Q. Decimal points?

A. Yes. Tenths, I would say.

Q. What about for service-connected death claims?

A. About the same amount of time. The work quarters [59] generally run from one hour to three hours.

Q. And what about appeals?

A. That's a two-hour—within—closer to two than one or three.

Q. And what about non-service-connected disability claims?

A. One and a half, perhaps.

Q. And would it be a similar amount for non-service-connected death claims?

A. More than one work product may apply in the course of processing a particular claim.

* * * * *

[61] MR. ERSPAMER: Q. Now, are you aware of the power that resides in the Veterans Administration to issue

subpoenas to obtain documents in support of a claim that's provided in Section 3311 of Title 38 of the U.S. Code?

A. Yes.

Q. And how many instances are you aware of in which that subpoena power was used to obtain information with respect to a claim?

A. Two.

Q. And that is over how many years?

A. Eight.

Q. Do you recall those specific instances, what the subpoena—who the subpoena was directed to and for what [62] purpose it was issued?

A. Yes.

Q. Can you describe those for me.

A. We had a claimant in Philadelphia who we felt was deliberately misleading us and he would not produce medical records or he would not authorize his private physician to release medical records. We issued a subpoena for those private medical records.

Q. And approximately how long ago was that?

A. Six, five, six years ago.

Q. What position did you hold at that time?

A. Adjudication officer. Same position.

Q. As you hold now but in a different region?

A. Yes.

Q. And what is the second instance in which you're aware that the subpoena was—

A. Well, actually, it hasn't been issued. It's in process. And it's to obtain proceedings on a criminal investigation where the widow is a suspect in the death of the veteran and she is now claiming life insurance benefit. And the sheriff will not let us have the records which we feel may shed light on the extent of the widow's complicity, if any.

So we are in the process of issuing a subpoena to get those records from the Sheriff's Department.

* * * * *

[63] Q. Are you aware of any instances in which the local office has experienced difficulty in obtaining service records? Have they been lost or destroyed or some other reason—

A. Yes.

Q. Can you describe, in general, the problems that have occurred.

A. The major problem was the fire at the NPRC. No. Was it NPRC or RPC? In other words, the records depository. It was the RPC. A fire at the records processing center in St. Louis in 1973 in which many records were consumed. That is the major problem we have had with obtaining service records.

Q. And what records were stored there, in general? What [64] what branches of the service?

A. Individual medical records. From what branch of service? Army. Primarily the army.

Q. And others you're aware of?

A. Well, the Air Force—To the extent that the Air Force was part of the army at the time of those records, the period those records covered, the Navy was not involved in that problem.

* * * * *

Q. And for what period were the records destroyed? I assume it's pre-1970—was it 1973 you mentioned? Going back how far?

A. 1912 to 1959. That doesn't mean that anybody with service in those areas has no records. The majority of persons I like to think who had claims had filed them with the VA and we had possession of the records. Anytime you file a claim with the VA, the first thing we do is get service medical records.

So we had millions and millions of records for people with service in that period. It's only those who had never filed a claim who had the misfortune of seeing their records destroyed. There are other sources to corroborate whatever claim they may be making. I said that they were individual medical records.

We do have medical records pertaining to organizations and we do have personnel records. So it's not a total loss, [65] although it was a very significant loss.

Q. It is unfortunate for the people whose claims depend upon those medical records, establishes a difficulty in proving up a claim?

A. For the lapse of time and absence of records, yes.

* * * * *

[69] Q. And what is your understanding of the purpose of service-connected death and disability compensation?

A. The purpose?

Q. Mm-hum.

[70] A. Well, the term "compensation" implies payment for an injury or—an injury or death following from official duties in service. And the government has an obligation to compensate for that injury. It's a payment in lieu of what would have been continued in services. That's pretty much what it means.

Q. And in instances where entitlement to death and disability compensation is shown, in other words, say, a disability is shown, it often interferes, does it not, with the soldier's ability to obtain meaningful employment in private life as well as in the military?

A. The amount compensated in a disability claim is supposed to be an amount equal to the—what would be anticipated as lost wages from that type of injury in the civilian labor fields. The degree of disaiblity is based on what we call the average impairment of earning capacity.

Q. And how does the service-connected disability, death and disability program, differ from the non-service-connected death and disability program?

A. The non-service-connected is a gratuity that is income dependent. It's, obviously, not related to service, and yet there may be service qualifications, such as war-time service as opposed to other service. And it's intended to supplement whatever income the person may have so long as he has income below a statutory maximum. So it's an income supplement program.

There must be a finding in a disability case of permanent and total disability. There is no disability test [71] in death cases for the widow.

* * * * *

[74] Q. And what percentage of cases decided at the regional level is a hearing requested, approximately, in your experience?

A. I cannot give you an answer on that.

Q. It's a very small percentage, is it not?

A. I just don't have the facts on that. I could tell you how many hearings were conducted over a period of time, but I can't tell you how many decisions are followed by hearings.

Q. Okay. In our tour yesterday, you don't recall telling me that approximately one percent of the regional office determinations resulted in hearings.

A. I don't think I would have said one percent. I might have said something—five percent or less. I don't recall saying one percent. That would seem to me to be too—too small a number.

* * * * *

[75] Q. And in your experience locally, in approximately how many cases does the claimant just not show up for the hearing without telling you in advance?

A. Fairly commonly. Again, I don't have hard data, but it's fairly common.

* * * * *

Now, can you tell me whether you disagree or agree with the following statement: "The hearing process is an important safeguard to the individual and to appellate consideration."

And for the record, I am reading from the MBVA-1, Change 16, Chapter 5, Section 5.02 manual. Do you agree that the hearing process is an important safeguard to the individual and to appellate consideration?

A. Yes.

Q. And that would apply to the hearing—Would your opinion extend as well to hearings held at the local level?

A. Oh, yes.

Q. And what is the value of a hearing, as you understand, at the local level, from the claimant's point of view?

A. It allows the claimant to confront those decision-makers and show himself as an individual. I think—I think

it injects a human note into the whole affair that otherwise would be reduced to an exchange of paper.

And there are situations where just seeing the claimant, particularly in neuropsychiatric cases, just seeing the patient does more for the evaluation process than reading psychiatric reports.

That's one aspect of a hearing, but it also gives the appellant the satisfaction of knowing that the people he is dealing with are humans, that—well, whatever he derives from that, whatever impressions he gets. I can't speak to that. But it's a beneficial process in that it brings matters together so that they can see one another as [79] individuals.

And, of course, with some guidance sometimes from the persons conducting the hearing as to points that may not be clear in the record, we can elicit from the appellant some new facts perhaps sometimes, or he may recall something in the course of discussing the case, he may recall something that hasn't been in the record before.

* * * * *

[80] Q. Now, if I could direct your attention to the exhibit that I had you put your thumb on—

A. Yes.

Q. —and more particularly, to the—if you could for a moment—I'll get my copy here, so I don't have to bend over.—to Exhibit H. And particularly to Exhibit H to the [81] Complaint. And particularly to the statement, "Thirdly, certified statements carry as much weight as in-person testimony." Do you see that sentence, sir?

A. Yes.

Q. Do you agree or disagree with that?

A. I don't agree that it should have been communicated. I don't agree that this letter was appropriate. That's partly why.

Q. Did you sign this letter or draft this letter?

A. No, I didn't. I did not draft it or sign it. I would not have signed it.

Q. And for what reason would you not have signed it, or reasons?

A. It talks of a backlog of scheduled hearings, which is not necessarily true. It says it would most likely be several

months before a personal hearing could be held. That's not true. It discusses time allowed for typing, which is not a consideration. It would delay submission to the appeal, to the Board of Veterans Appeals.

That's not true. This is an inappropriate letter. It is totally dictated by some person. It is not in any way related to or reflect the division policy.

Q. And when you reviewed the Complaint, did you review this particular exhibit to the Complaint? Do you recall?

A. I believe I did. I went through the exhibits, particular exhibits, I did, and the ones relating to the hearing letters I did review. And it was—I had the same feeling when I read this letter. It was inappropriate.

[82] Q. Did you try to ascertain or determine who wrote it?

A. It wasn't material at that time. It had transpired. It had been released.

Q. From the number that appears below, in reply, refer to 343 215, would that indicate the unit that issued it?

A. Yes.

Q. And what unit is that?

A. 215 is a section. It's not a unit. So somebody at a section level wrote the letter, either the section chief or a member of the rating board.

* * * * *

[90] Q. As a matter of fact, the representation of claimants by attorneys is very rare in actual practice in this region, isn't it?

A. It's not common at all.

Q. And would it surprise you if I represented to you that only approximately two percent of cases at the BVA level are the claimants represented by attorneys? Would that statistic [91] surprise you?

A. No.

Q. Would you think a comparable percentage would apply to cases in the local level here?

A. Approximately.

Q. Something roughly comparable?

A. Approximately.

* * * * *

[92] Q. Who at the regional level would be most knowledgeable about the number and incidence of cases in which a claimant is represented by an attorney as opposed to self-representation or representation by a service officer?

A. I would.

Q. And are you aware of any attorneys, private attorneys locally, who specialize in veterans counseling or work?

A. No.

* * * * *

[94] Q. And do you perceive a more compelling need for representation by attorneys in more complex categories of cases such as radiation cases or Agent Orange cases?

* * * * *

THE WITNESS: Whether an attorney is representing the claimant or not, there's certain actions that we will take. I'm sure an attorney who's got a strong interest in a case will pursue it and inquire as to what our procedures are and see that we followed them.

In that sense, he might do that, where the person representing himself would not, would not know what our procedures are. He could find out, but we don't volunteer that. It's a question of assuring that we do what we're supposed to do, which we normally do, so—

Q. It's a lot more than that, isn't it? The attorneys can certainly—You use, for example, the Freedom of Information Act to gather documents from agencies other than the agency that you refer to for, let's say, evidence of exposure to radiation?

A. If he's aware of other sources that would contribute evidence to the case, yes.

[95] Q. And the attorney would have a greater facility or ability to obtain experts to testify as to—on issues such as exposure, causation, and so on, medical experts, other experts?

A. I would imagine he could, yes, if there's a case to begin with.

* * * * *

[96] [A.] And there's a lot of room for judgment in cases involving the rating boards. For example, in psychiatric cases, how do you determine whether somebody's 30 percent disabled or 70 percent disabled. There's a wide scope for judgment there. In some discharge cases, you're dealing with a question of whether or not they were compelling circumstances for a person going AWOL, and that requires evaluation of his motives, and so forth. And it gets quite involved.

Q. What about post-traumatic stress syndrome cases? Is that a category you would say involves a lot of area for judgment as well?

A. Yes.

* * * * *

[97] Q. They're more difficult to win is what you're saying? Radiation cases are very difficult to win?

A. With those facts, yes.

Q. Well, they—The vast majority of the radiation cases have been denied. Is that your understanding of the case?

A. Yes.

* * * * *

[113] Q. Can you identify it for the record?

A. It's a Department of Veterans Benefits Circular 21-80-1 signed by the chief benefits director as revised January 4, 1982.

A. And can you just explain what a circular is?

A. It's a directive limited to a particular issue that goes beyond the regulatory language. It expands on the regulations, ordinarily. Quite often, they cover new legislation that there's been no time to incorporate into the statutes.

Q. And can you explain how a circular differs from an interim issue?

A. An interim issue is a change to an existing manual that is published pending revision of the manual. And a circular stands on its—It's a complete statement and there will be no incorporation in a manual, ordinarily.

[114] Q. And are circulars published in the Federal register?

A. I'm not certain of that, to be honest with you.

Q. Are they available to a claimant's representative upon request?

A. They get them automatically, the service organizations that are associated with it.

Q. What about private attorneys?

A. Oh, no, other than through the Code of Federal Regulations which wouldn't incorporate the circular.

Q. Is there any other material in the nature of substantive standards or procedural standards that is not available in the Code of Federal Regulations?

A. I don't know of any.

MR. STOLL: I think we've—

MR. ERSPAMER: Q. What about program guides? What is a program guide?

A. Well, the agency position is that that's not a substantive publication with the weight of regulation.

Q. What is not, the program guide?

A. The program guide.

Q. What is a program guide, though?

A. It's a discussion of problem areas. It elaborates on particulars of a problem area.

Q. For example?

A. Well, we commonly get them on income—discussing income situations where you have a regulation that says that charitable income is not countable. Then you'll have a program guide that says this particular source of income is a [115] charity.

Q. Can you think of an example in the context of death and disability compensation of a program guide?

A. We have one on individual unemployability that expands on the provision of the rating schedule.

* * * * *

[116] Q. Are you aware of any claims granted for the—for medical conditions resulting from alleged exposure to Agent Orange?

[117] A. I'm not aware of any, myself. There have been some, I understand, for chloracne, c-h-l-o-r-a-c-n-e.

* * * * *

[119] Q. So if I understand you correctly, there's a—the problem in many of the cases has been a failure to

show a correspondence or a causation between the problem the veteran is experiencing and the exposure to Agent Orange?

A. Right

* * * * *

[126] Q. What type of workup do you use locally with regard to post-traumatic stress syndrome case? For example, would you go out and interview—try to identify who some of his fellow servicemen were in the area at the time or document an—

A. No.

* * * * *

[128] Q. And approximately how frequent is this type of claim, in your experience in the local level? More than the radiation claims?

A. Yes.

Q. More than the Agent Orange claims?

A. About equal. Quite often, we get dual claims, Agent Orange and PTS together. The person claims both, we find that he has PTS.

Q. And I think you said a few moments ago that quite a few of them have been granted?

A. Yes.

Q. Do you have any idea as to the approximate percentage that have been granted at the local level?

A. yes.

Q. What percentage?

A. Well, it has varied over if past several years. It has increased over the past several years. Initially, it was running about 20 percent. Then it went to 30. Now it's in the 40 percent range.

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VOLUME II

DEPOSITION OF THOMAS H. VERRILL
MAY 6, 1983
(CAPTION OMITTED)

[144] * * * * *

Q. Now, in a case where hearings are requested locally, it's rare, is it not, for a hearing to be requested before an initial decision?

A. I would say it's rare. It's not common at all.

Q. It's more common, is it not, where hearings are requested in the local level for them to be requested after the initial decision has been rendered?

A. Yes.

Q. And the initial decision, if, again, I might refer you to the Complaint, is usually expressed in very, very pithy, if I might say, terms, such as Exhibit K to the Complaint which states, "Your claim for death benefits is disallowed. The evidence does not establish that the veteran's death was due to a service-connected disability." That would be a typical notice of decision, would it not?

A. What you're showing me is a computer notice that are the most common notices for initial resolutions; however, we have a whole category of claims in which the employees are instructed not to use the Target correspondence. It is generally insufficient. My opinion is that the computer—We call it Target. The computer correspondence is inadequate for many situations.

[153] * * * * *

Q. Now, in connection with the adjudication of the decisions at the regional office level, do you occasionally find that the claimant does not understand the procedural process locally?

A. Yes.

Q. And, in fact, occasionally, you'll find that you receive requests from a claimant for a hearing over the phone, as an example?

A. It's possible they could request a hearing over the phone, yes.

[155] * * * * *

Q. Well, it's generally—It's generally the case that where there's been a failure to file timely, the BVA will deny the appeal on that basis?

A. I can't say that that's true. That would be the more common situation, yes, but I just want to make the point that they do have the option of ruling on the merits. And I've seen them do it on occasion.

[163] * * * * *

MR. ERSPAMER: Q. Did you have a total there then that you've added up that would approximate the number of appealable decisions?

A. Well, the total is close to 250,000.

Q. Some grants might be an appealable decision. For instance, if somebody got a grant of a 40 percent disability rating and thought he was totally disabled, that might be an appeal decision which he had incentive to appeal, correct?

A. All grants are appealable and all disallowances are appealable. We don't normally get a disagreement with a grant. Not as commonly as with a disallowance, of course. But any grant is appealable even if it's what was originally claimed in toto.

Q. So roughly one out of every 125 appealable decisions on [164] the regional offfice level actually result in NODs. Would that be a rough approximation?

A. If that's the ratio you found, I will accept that, yes.

Q. 1954 over 250,000? It would actually be something a little less than that. But approximately one in 125.

A. Now, let me doublecheck something here. That's right.

[171] * * * * *

Q. What does it mean to, let's say, in the case of an initial compensation claim, to the number 2.284, what does that mean as expressed in the local process?

A. The whole division gets two hours and eight-four hundredths hours credit for each initial compensation claim process.

Q. And credit in terms of what?

A. In terms of productivity, it's a productivity measurement. That amount of time is measured against the [172] number of people we have to do the processing in a given amount of time.

So if we have a ratio of production hours to actual employee hours, that is, within a range of the national average, then we are considered to be appropriately productive.

Q. And do you get heat, so to speak, from the central office if you productively arrange dips outside of those parameters?

A. Within a ten percent range, let's say. For example, if the national productivity were 85 and we had 75, we'd be at the lower end of the acceptable range. We would probably get some inquiries, yes.

Q. And what would the 85 signify?

A. 85 percent productivity, the ratio of the work product credits earned to the available people. That will allow 15 percent margin for overhead—

Q. I see.

A. —annual leave and things like that.

Q. In the case of an individual employee, are statistics mantained with regard to their productivity?

A. Yes.

Q. And are those maintained locally or at the national office?

A. Locally.

Q. And can you explain the respect in which the advance of an employee within the heirarchy depends upon his personal productivity ratio?

[173] A. When it comes to employee performance, we consider three major factors. None of them dominates. You can have high productivity and not get promoted if your quality is lousy. We also consider the timeliness of the actions you take. So we have three major categories; production, quality and timeliness. You have to do well in all three to be competitive.

Q. And how do you gauge the timeliness of actions? What mechanisms are in force to do so?

A. Well, we use a system whereby we categorize the work on hand in terms of being a certain age. And we break

the work down as work that's 14 or less days old as opposed to work 15 or more days old.

And then we get a division total ratio of category one as opposed to category two. That ratio becomes a norm for employees. So if you have an employee who has a ratio out of—way beyond the average, that person would have a timeliness problem. We have a specific standard. I think we revised it recently, but I think it's one and a half times.

[196] * * * * *

Q. Now, the case of the rationale you expressed about depletion of the legal benefits, that is not—does not and could not apply at the present time to Agent Orange claims which you testified on Friday have all been denied, correct?

A. Well, we had specifics on the ratio of denials. None [197] has been granted on the basis of Agent Orange exposure, per se. That's true. So you're not depleting anything where there is no grant. That's for sure.

Q. And the Agent Orange claims, I believe you testified, present particularly troublesome questions on—in the area of causation and other questions?

A. From the medical standpoint, yes. The causation is something that has not been resolved by the medical profession with the exception of very few limited disabilities.

Q. And in the case of atomic veterans, the vast majority of those claims have been denied, too, and so the same rationale would apply—excuse me—the same conclusion with regard to the depletion rationale would apply to those cases, would it not? In other words, there isn't any depletion where the claims have been denied?

A. That's right.

[198] * * * * *

Q. With regard to the volunteer organizations' role, your understanding of the rationale of the free available service rendered by service organizations depends on an assumption, does it not, that they perform an adequate role that is comparable to that which would be played by attorneys in the process?

A. I don't know if anybody is stating that.

Q. My question is—

A. As far as the question goes to adequate representation, our consensus is that they do provide adequate representation.

Q. Have you ever come across any situation in which you concluded that a service representative had not provided adequate representation?

A. It has happened, yes.

Q. And if the fee limitation was eliminated, it wouldn't preclude a continuing role for service organizations? You're not saying that it would, are you?

A. No.

Q. And if the fee limitation was eliminated, it would allow the claimant to decide whether he wanted an attorney or a service organizations to represent him?

[199] A. Well, that's true, but the danger is that a person might feel they need an attorney to, in effect, complete a form where they meet all the legal requirements with no exceptions, and would have got a benefit with or without an attorney. And they will suffer a loss of a benefit that would otherwise have been totally theirs.

Q. That conclusion or that scenario assumes that they—that basically, they would not be well versed or understand their entitlement, does it not? In other words, it assumes that they could not make—they're not capable of making the decision about whether or not their claim is complex enough as to require the services of an attorney?

A. Well, it assumes that they did not or will not have gone through that process.

Q. Now, you say you have been confronted with a number—some situations in which a service organization representation has been inadequate. Can you give me the most recent example you can think of, describe to me.

A. The details aren't all that clear, unfortunately, but something in the range of a year ago I came across a case where I felt the decision had been wrong, let's say, for short, and should have been appealed. And the service representative did not appeal it. I personally prepared a notice of disagreement, took it to the service representative, and asked him to sign it, which, of course, he did.

[200] * * * * *

Q. Well, you're not suggesting, are you, that all VA claims are as simple as filling out a six-item form, are you?

A. Not at all.

Q. A lot of the claims that are currently being adjudicated by the VA require considerable workup and work, do they not?

A. Yes.

[207] * * * * *

Q. And can you just identify for the record the—these two bound volumes that have been produced?

A. Together, they constitute what is called DVB, Department of Veterans Benefit manual, 21-1. It's a basic procedural manual for the adjudication division.

Q. And can you explain the circulation of the basic manual?

A. Yes. Employees from the GS-4 claims clerk level up to my level receive a copy. Claims examiners will each have a copy, for example. Rating specialists will have a copy. Sometimes they share one copy for the whole board because they don't need—most of the rating specialists have their own personal copy, though.

Some of the claims clerks share a copy. But the claims examiners each have their own copy as do all the supervisors.

Q. And is it circulated outside the agency at all?

A. Service organization representatives would have copies or could have them if they don't. I think most of them do.

Q. And they can obtain copies upon request, service organizations?

A. Yeah.

Q. What about claimants who represent themselves? Would [208] you furnish a copy to them upon request?

A. If they ask for it, yes. I don't recall any requests for it.

Q. And what about attorneys for claimants? Do you recall any request for it by an attorney?

A. No. Generally, they ask for more substantive material such as material from Title 38 or the VA regulations.

That's a procedural manual that gets very, very detailed regarding a lot of mechanics.

Q. And at the front of these volumes, I see a lot of changes with various dates on them. Do the sections that follow incorporate all those changes that are referred to in the changes in the beginning?

A. Yes.

[209] * * * * *

A. That is the Department of Veterans Benefits program guide manual, 20—Wait a minute. No. Program guide 21-1.

Q. How does the program guide differ from the M21-1 MBV that was marked as Exhibit 17?

[210] A. M21-1 is a procedural manual. PG 21-1 expands on specific problem areas that have arisen here or there throughout the country, and central office is trying to explain just what policy we should follow.

Q. So you would expect that the program guide would not necessarily cover every base in the system but just certain select topics; is that right?

A. That's right.

Q. And can you explain the circulation of the program guide.

A. Perhaps a bit more restricted than the others in that claims clerks might not get them but claims examiners would get them. Rating specialists and supervisors would get them. We also furnish copies to service organization representatives.

Q. And are they periodically updated? Are you given updates of it?

A. Yes.

Q. And would circulation be similar as you described for the procedural manual with regard to attorneys and claimants?

A. Yes, if they are aware of the program guide or if it's cited in anything we send to them, then they have means of identifying it and they ask for it, we certainly would give it to them.

Q. In your experience, are attorneys generally aware of the existence of the program guide?

A. I would say generally not, unless we happen to cite it as a basis for our action.

Q. What about claimants, unrepresented claimants?

[211] A. On the same conditions.

Q. What about their awareness of the procedural guide, which was Exhibit 17? Are attorneys generally aware of the existence of the procedural guide, M21-1?

A. Not specifically, no.

Q. And what about claimants? Would your answer be the same?

A. Yes.

[220] * * * * *

Q. And is there anything else that you apply by way of either procedural or substantive standards?

A. Circulars? Did you mention circulars?

Q. Okay. I don't think I did specifically mention circulars, yeah. Circulars would be something else that would emanate from Washington, D.C.?

A. Yes. That's essentially it.

Q. And judged collectively, that's a considerable volume of material, is it not?

A. Yes.

Q. Are there—Is there an index, collective index, to this material?

A. I have a cross index myself.

Q. That you personally developed?

A. Yes.

Q. And are copies of that available to everybody in the regional office?

A. No.

Q. Is the cross index you developed included in the material which you brought with you this morning?

A. It's a card file.

Q. So it's not, I take it?

A. No.

Q. And is that something that you've developed over a course of, what, 15 years at the VA?

[221] A. Yes.

Q. How many—Approximately how many cards are in the card file?

A. The file is about six to eight inches deep, so how ever many cards you could get in that, 100 or 200.

Q. And for what purpose did you develop the card file?

A. To save myself a lot of time. We intend—I might as well add a postscript at this point. We intend to develop for local use, at least, a cross index for all employees as soon as we get a small computer. We are now in the process of trying to get permission to buy a small computer. One of the first uses will be an index available to all employees.

[223] * * * * *

Q. Now, isn't it true that the typical substantive appeal prepared by a service organization is one page or less?

A. Yes.

Q. And—

A. Can be less than one page.

Q. And generally, you don't receive a brief, so to speak, a legal brief of citations to authority and description of the facts and interwoven—interweaving the facts in the law in the case of a substantive appeal?

A. They do not routinely prepare briefs.

[225] * * * * *

A. It's within the range of the typical submission, yes.

Q. In the case of where a hearing is requested by a claimant at the regional office level, it's often typical, is it not, for the claimant to meet the service officer half an hour or so before the hearing for the first time to discuss the—what would be presented at the hearing?

A. I would say that's the more common situation, yes.

* * * * *

Q. Now, in the case of local hearings and excluding the BVA hearings that are held at the local offices, it's typical—in the typical hearing, the only witness who appears is a claimant, usually; isn't that correct?

A. Well, quite often they will have one other person with [226] them because they needed help getting here. We deal with a lot of elderly, naturally disabled people, too, and quite often, they'll have a friend or relative accompany them but they don't really participate in the hearing.

Q. So if I understand you correctly, a number of the claimants who appear for the hearings are elderly or disabled?

A. Yes.

Q. And so my statement is correct, that as far as testifying or taking an active role in the hearing, the person—in the case of a hearing, it's typical just for the claimant to testify?

A. It depends on the type of hearing. Other than hearings relating to nervous conditions, that's true, but when you are dealing with nervous conditions, it's more common there to have a family member along testifying as to the behavior. Almost a majority of our hearings relate to nervous conditions. It's really a very common topic for a hearing.

Q. And that would include post-traumatic stress syndrome?

A. Yes. Of course, it's the subject that has more room for judgment, too.

Q. And with regard to documentary evidence, it's rare, is it not, to get documents introduced at a hearing at a local level? And I'm putting aside everything that's filed before the hearing is held, I assume which includes the service records and the medical records and everything. But to actually have a witness offer documents at a hearing at a local level is rare?

A. I don't know that it's rare. More commonly, they come [227] in with themselves alone with their case, that's true. But I wouldn't say it's rare. Quite often, they come in with a recent medical report either from a private hospital or private doctor. That's the most common type of document they bring with them.

Q. Can you recall other types of documents, putting aside, you know, the medical reports?

A. Documents relating to dependants. That would be one. I don't know if I've exhausted the types. I'm trying to think of what else they might bring. Personal statements or statements from friends and relatives are sometimes introduced.

Q. Are they infrequent?

A. Yeah, I would say so. They normally come prepared to make verbal testimony only.

[228] * * * * *

[A.] One of the problems of hearings is the agitated state of the appellants. That's a matter of concern for me when it comes to the safety of the hearing panel. We have had threats. We have had people come in with what could be described as a weapon. And it's a serious concern.

[228] * * * * *

They tend to repeat what we already have on record, and there's a lot of rambling conversation which we try to control but we don't go too far in controlling that.

[229] * * * * *

Q. Well, would you often find—you said that the statements were often rambling. Do you find they often include a lot of irrelevant matter?

A. Oh, yes.

Q. And do you find that often they're very emotional?

A. Yes.

Q. Is that more prevalent in the case where a claimant is unrepresented than when a service officer or an attorney represents them?

A. I don't think, when it comes to rambling nature and the emotions, whether it matters. I—I really don't think that that makes a lot of difference to the claimant. They can be very agitated whether or not there's a representative sitting with them.

Q. And do you find that a high percentage of people are agitated and emotional?

A. Well, as I pointed out earlier, we tend to get a lot of hearings on psychiatric cases, and that's part of that type of case.

Q. Now, in the case of a hearing, there's a panel, as I understand it. The Rating Board, the three people on the Rating Board, would conduct the hearing; is that correct?

A. Well, you would have three persons; two rating specialists and the medical specialist, the doctor.

Q. And is it your standard practice to have the claims examiner there who made the initial workup on the case?

[230] A. No.

Q. And is it your practice to have that person available for cross-examination at the hearing?

A. No.

Q. Is it possible for the claimant to request that that person be present for the—for cross-examination and that request to be honored?

A. We've never had such a request. I don't know how it would aid anybody, as a matter of fact.

[232] * * * * *

Q. How frequently do claimants introduce scientific articles that are studies in support of a claim?

A. Well, let me answer that in a roundabout way.

MR. STOLL: Are you taling about at the hearing or at any point?

MR. ERSPAMER: At the hearing. At a hearing.

THE WITNESS: It is uncommon. I am thinking of two cases where the claimant was represented by an attorney. And I remember the names of the cases, the Bay case, B-a-y, and the Sanders case, S-a-n-d-e-r-s.

Both cases, I felt, were supported by excellent briefs, very thorough, very detailed, making lots of citations, making lots of references to VA directives, supporting these with expert opinions, et cetera.

[234] * * * * *

Q. Now, at the regional office level, how frequently are experts employed at the hearing state? Have you ever seen an expert?

A. How do you mean, from our requesting it or the claimant requesting it?

Q. The claimant offering an expert on a question.

A. Rare.

Q. Have you ever seen one?

A. Personally? I haven't see one.

Q. And has anybody ever told you about an expert appearing [235] at a local hearing?

A. Oh, once or twice, something along that range in two years.

Q. Now, I believe yesterday, in connection with the Al Maxwell case, you indicated that a medical opinion issued by Susan Lambert was something that I believe you stated approached giving rise to a question of reasonable doubt. Does that correctly state what you said? To the extent it's inaccurate, why don't you just recapitulate?

A. No. It's substantially what I said.

* * * * *

Q. My question is meant to be limited to a specific medical opinion rendered by an expert either verbally at a hearing or by way of a report dealing with the specific facts and circumstances of the claim. Is that very rare?

A. Yes.

[240] * * * * *

Q. Now, are you aware locally of any applications for the $10 fee by an attorney; in other words, applications for the—to be approved by the statute?

A. Yes.

Q. How many are you aware of?

A. One.

Q. Going back to your 15 years in the VA, how many are you aware of?

A. Absolutely aware of just this one, recently.

Q. So I take it by that that they're not very common?

A. No.

Q. And can you explain the circumstances under which the $10 fee was requested, the one you referred to?

A. An attorney had represented a veteran knowing that that would be the fee limitation, and the claim was allowed, and the attorney asked for the fee that is payable on allowance of a claim.

Q. Did that surprise you?

A. Yes.

Q. Why did it surprise you?

A. It's hardly worth the cost of correspondence.

Q. And what was your understanding as to why he went ahead and asked for the $10?

A. I would imagine that it was a way of expressing—Well, [241] I really shouldn't say, because I don't have any

idea what the attorney had in mind. Didn't seem to be a case of harrassment because all the correspondence from the attorney had been quite reasonable and polite.

But it was there. We had to go to the book and dust off the pages and research how to make that payment. And we finally did decide—did determine how it should be paid. It cost maybe $50 in manpower to determine what the procedure was.

Q. And so I take it you'd agree with me that the $10 fee limitation, in actual fact, works out to an outright prohibition on payment of fees for attorneys, in actual fact?

A. Payment of fees. Not representation, but payment of feels, yes.

[242] * * * * *

Q. Now, in the case of a denial of a claim, there's no fee allowable at all; is that correct?

A. We don't pay for failure.

[247] * * * * *

Q. Well you would assume, would you not, that if the fee limitation were removed, that attorneys would become as expert or more expert in the government VA regulations as are service representatives, would you not?

A. They could be if they desired to specialize in it and if they made day-to-day contact with the regional office to get the latest productions. We get, on the average of any given week, three or four new policy statements. One of the most demanding things about the job is just to keep up with new directions coming in.

[258] * * * * *

Q. Is there any respect in which the VA regional office is hostile toward attorneys representing claimants?

A. We have some detaled guidelines on how to deal with attorneys, and we are careful to instruct our employees not to respond in kind or not to respond in the same tone.

Frequently, a letter from an attorney will be rather harsh sounding, rather demanding, and an employee will respond in the same tone. And then everything goes down-

hill from there. So we're very careful to advise them to state the facts and be respectful and fully informative.

A major problem is not telling the attorney enough. Some employees are very reluctant to disclose a lot to an attorney based on his initial letter, and they don't—they aren't as familiar as they should be with some of the fine print. So that's been a subject of training.

* * * * *

VOLUME III
DEPOSITION OF THOMAS A. VERRILL
JUNE 17, 1983
(CAPTION OMITTED)

[272] * * * * *

Q. Now, with respect to your earlier statement that the claimant could have a hearing at any time, if I might refer you to Exhibit 17, Part 1, which should be in front of you. It's one of those stacks. I'll read it to you out of my volume here.

[273] Are you familiar with M21-1, Change 320, dated January 5th, 1982, Section 18.18, which is at page—at Exhibit 17-152, which states, "a. General Policy." Under (1):

> "The due process requirements stated in VAR 1103 are for application throughout the adjudicative process. An integral part of due process is the right of a claimant, upon request, to a hearing at any time on any issue involved in a claim within the purview of VAR's 1000 through 2899 inclusive."

Are you aware of that provision?

A. Yes.

Q. And do you agree that an integral part of due process is the right of the claimant to request a hearing at any time on any issue?

A. Yes.

Q. And handing you what's been marked as—previously as Exhibit 17-137 through 17-138, can you identify the handwriting on that document?

A. Yes.

Q. Whose handwriting is it?

A. That's mine.

Q. And did you prepare that document?

A. Yes.

Q. And was that distributed to section chiefs in the regional—Northern California regional office?

A. Yes.

[274] Q. Was it reduced to a typewritten document—

A. No.

Q. —or was it sent out in your own handwriting?

A. It was produced in this manner.

Q. Okay. And can you explain the circumstances under which you sent out documents of this type?

A. Well, let me read it.

At this time, as I recall, we had a high backlog in the rating boards. And I suppose we had a high number of requests for hearings. I would point out that anything handprinted like this and passed around as a note is an informal, non-controlling statement. It is not a directive that is intended to be binding over a period of time. This was a temporary expedient.

Q. Did you ever rescind it?

A. I don't believe I did. I wouldn't rescind something so informal.

Q. And is it still the practice in the local—in the local Northern California regional office for—or a requirement that the signatures of a section chief be obtained for all requests for a hearing prior to the time an original decision is made?

A. We screen requests for hearings through section chiefs. I don't know that we require a signature, but section chiefs do see the request for hearings, yes.

Q. And in what way are the resources locally limited with regard to provision for hearings at the predetermination stage?

[275] A. It's just a matter of having a limited number of people for potentially unlimited number of claims and requests for hearing.

Q. You believe you have—you don't have the proper resources to provide hearings for all cases in which the claimant requests them?

A. Well, the frequency of requests is so low that I'm not prepared to say that we lack adequate resources at this point in time.

Q. Well, what about from time to time? Do you conclude that there are periods of time in which your resources are inadequate to provide hearings to all people who request them?

A. Apparantly I thought so at that particular point in time. I believe that is—

Q. April 20th, 1981.

A. April '81. At that point in time, I must have felt that our resources were being strained. I wouldn't say that now, and I'm not prepared to project that we'll have a similar situation in the future.

In any event, on the question of hearings, I'd like to point out the practical experience we have in adjudication would encourage us to guide the claimant into a hearing at the point where it really would become potentially decisive.

By that, I mean, that from time to time, infrequently, but nevertheless from time to time, we get a request for a hearing before we've made a decision. The second chief will review that request and review the claims material and decide that in all probability, we will have a grant. And where [276] that's the case, we would suggest that the question of a hearing be postponed until we've made a decision.

Q. Isn't the predetermination stage the most meaningful opportunity the claimant has to convince the VA of the merits of his claim?

A. Not necessarily. The facts speak for themselves. In so many cases, the great bulk of cases, it's a simple question of reviewing medical records. A person may claim that he lost a hand in medical records in service. Service medical records show that he lost a hand. We're waiting for the VA records to show the current degree of disability resulting from the loss of that hand.

In this case, if a claimant should ask for a hearing before we get that VA examination back, the hearing would serve no purpose. It would inconvenience the claimant and do nothing to effect the decision. The decision is cut and dry.

Q. Well, what about—I'm sorry.

A. Well, I'm just saying that we try to exercise good judgment in the management of our resources. And where we have a probable grant, there is no point in having a hearing other than providing an opportunity for a social get-together.

Q. Now, in the instance where a claim is initially denied, wouldn't you agree with me that the claimant is facing an uphill battle to get the VA to change his decision?

A. Yes, ordinarily, if we've made a good decision. Yes.

Q. And at that point in time, with respect to those cases that are denied, wouldn't you agree that the interest has an important—the claimant has an important interest in [277] obtaining a predetermination hearing?

A. Well, it wouldn't be a predetermination hearing at that time. We've made a decision denying benefit. I think what we're getting into is our policy of encouraging a hearing after a statement of the case.

We do that for the simple reason that if we had a hearing before the statement of the case, the person would then be entitled to a hearing after the statement of the case. We'd end up with two hearings in every case. And it's just not practical.

Q. Well, the—The government regulations, including the VAR 1103, and the section of the M21-1, which I read to you previously, require that a claimant be allowed a hearing at any stage in the process, whether it's one, two, three or ten, do they not?

A. Yes. It says the person is entitled. What we do is, where a hearing has been requested, we will make the effort to produce a statement of the case and remind the claimant that they have asked for a hearing and they may proceed with a hearing after reviewing the statement of the case.

A person is not really well prepared to proceed with a hearing until they have the statement of the case which explains all the law and all the facts on which we made our decision. The person then is free to review this and present a set of facts at a hearing that would counter our position.

This really is a matter of being better prepared to proceed at that stage after getting a statement of the case.

Q. Well, I understand that that's perhaps your position, [278] but wouldn't you agree that there are occasions on which the claimant disagrees with that?

A. Yes, from time to time. Keep in mind that the frequency of requests for hearings is very low to begin with. The frequency of requests for a hearing on a whim at any time during the claims processing is even less common. If a person is persistent, they will get multiple hearings if they

want multiple hearings. But that right could be used merely to harass us.

MR. ERSPAMER: Off the record a second.

(Brief discussion off the record.)

MR. ERSPAMER: Can I have the last question read back.

(Record read.)

MR. ERSPAMER: Q. Well, I take it from your answer that the local hearing—Excuse me—local claims officers are hostile to multiple requests for hearings?

A. I wouldn't say hostile. They're interested in being practical. The claimant is not aware of whether the hearing is going to be to his advantage. As I said, before a statement of the case, they don't have a set of facts and laws that would be useful to them in presenting a counter-argument.

So it's our practice to proceed with the hearing after a statement of the case has been issued. It's not a matter of being hostile. It's just a matter of being practical.

Q. Well, would you agree that the adjudication personnel discourage multiple hearings?

A. Well, I'm not sure I would express it in that way, but [279] we—we try to get the most practical effect out of the hearing time that's available to all claimants.

Q. And directing your—reading from the attachment to your memo of April 20th, 1981, which is—I think you've written across "Sample and Reminder," which is—I'm reading from Exhibit 17-139 from a form letter.

Specifically, it states:

> "Your request for a hearing will be considered at a later date. We do not normally grant hearings before the original decision is made. If this decision is not favorable to you, you will then have an opportunity to file a Notice of Disagreement and initiate an appeal. Hearings are offered as part of the appeal process."

Would you agree with me that if that was sent out to a claimant, it might lead him to conclude that a hearing was not possible at the local level?

A. Could I see that?

Q. It's the second paragraph.

A. And the question, again?

MR. ERSPAMER: Read it back.

(Record read.)

THE WITNESS: The letter actually states, quote, "We do not normally grant hearings before the original decision is made," unquote. I don't think anybody would necessarily read that as a prohibition. It just says that we normally don't [280] grant them, the reason being, of course, that the decision might be favorable. And then the person will have gone to the inconvenience of the hearing to no avail.

MR. ERSPAMER: Q. And so you conclude that the statement that hearings are offered as part of the appeal process would not lead a claimant to conclude that he cannot obtain a hearing locally? The last sentence of the paragraph.

A. That sentence is incorrect. Hearings are offered as part of the claims process.

That letter is dated 1977. It's a Philadelphia letter. And I have not sanctioned the use of such a sentence in correspondence from San Francisco.

Q. Well, this letter was an attachment to your memo of April 20th, 1981, was it not? And it's entitled, "Sample and Reminder," and it's referred to in your handwritten letter which is on 17-137 and 17-138?

A. I don't know that it was an attachment to it. Somebody might have stapled the two together. One was issued in '77 in Philadelphia. The other, in '81 in San Francisco. I don't know that this—this doesn't refer to an attachment, does it, my handwritten note?

Q. Let me look at it. First of all, for the record, it was produced to us in the form of an attachment. But let me ask you another question.

Now, you're not suggesting, are you, that the handwritten language, Supervisors and Senior Adjudicators and Rating Board Chairmen, Sample and Reminder—you're not suggesting that the handwritten portion on the document [281] that's been marked as 17-139 was on the document in 1977, are you?

A. Yes, I am. Or within a period between 1977 and the date I left Philadelphia. I don't think I would use a

Philadelphia letter in a San Francisco situation. It would just tend to confuse people.

Q. Most of your forms that you developed that have been marked as Exhibit 18 stem from your Philadelphia experience, do they not?

A. Are you talking about pattern letters?

Q. Pattern letter, yes.

A. As I testified before, the pattern letters actually are a composite selection from a number of different offices, New York, Philadelphia, Cleveland, Ohio, and ones created in San Francisco. But they're all revised from time to time.

And I can assure you that in no current pattern letter would I sanction the use of that particular sentence which states that hearings are part of the appeal process. That's incorrect.

Q. Can you explain why then in the section of your personal copy of M21-1 in front of the section called Chapter 18 on appeals, the—this particular letter followed directly after your memo to the section chiefs that is marked as 17-137 and 17-138?

A. That's the problem of taking my personal manual to use in this manner. I have a habit of keeping papers relating to my various actions over the period of my career, and I keep them. I have an extensive file of past actions. And it [282] doesn't mean that they're necessarily practices in force. That's just my personal decision to retain that. I don't know if it has any more merit than what you would apply to a scrap book.

Q. Well, you—

A. There's nothing—

Q. Is it your testimony that the form which is attached followed directly after your memo to the section chiefs was not a part of the memo you might send to the section chiefs?

A. Yes, but you found them side by side in my manual just because I had retained them in that order.

There's nothing of a personal nature in that manual which is controlling. The only controlling things are the printed portions of the manual or official typed memoranda. As we discussed the last time, from time to time, I issue what are

called adjudication memoranda. Those are a official controlling statement.

These handwritten notes that you are finding in my manual represent situations that may have pertained only momentarily.

Q. And so it's your testimony then, I take it, that the employees of the Adjudication Division who received this memoranda, which is 17-137 to 17-138, were free to disregarded it?

A. That is the handwritten memo to section chiefs only?

Q. Yes.

A. Not the letter?

Q. The handwritten memorandum, whatever accompanied it. [283] But the handwritten memorandum is what the question refers to.

A. At the time that was prepared, it would be accepted by the section chiefs as something to consider when they were deciding whether or not to honor a request for a hearing. Whether or not they would retain that—the office didn't retain it—I can't tell you, but it was only a statement of what we were actually doing anyway. It probably reflects accurately the attitude we had at the time. I don't deny that.

Q. Well, you describe it as something—an informal memorandum. My question to you is: Does the relative informality of it and the fact that it's just handwritten rather than in a typewritten form, does that, according to your testimony, given the section chiefs who received it permission to disregard it?

A. They would weigh that statement against all other directives they had on the subject and exercise their own judgment in a particular case as to whether to give significant weight to that. If I wanted that to be given controlling weight, I would produce it as a memorandum. If I wanted to bind the section chiefs, in other words, to that policy, I would have had it typed. I have available any number of typists.

Q. So when you stated in your memorandum, "To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing,"

you were not communicating a policy change in your position as adjudication officer to your inferiors in the adjudication [284] process?

A. Well, I don't know the sequel to that, whether I published some procedures or not. But I can tell you the current procedures are that the section chiefs review requests for hearings. And they refer the requests that they feel should be scheduled to the secretaries.

Q. So if I understand you correctly then, the VA personnel are the adjudicators of when and where a hearing will be held, and not the claimant?

A. Well, the claimant doesn't necessarily understand what is involved in the request for a hearing. It may be, as I pointed out, superfluous. Why have a hearing when the law provides that, in a pension case, if your income is $3,028, you will get 200 a month?

Having a hearing on—in that type of situation, it's superfluous. So we exercise our experience and our understanding of the situation to the advantage of the claimant.

MR. ERSPAMER: Okay. I'm going to move to strike the answer as non-responsive, and I'll ask you to read it back to the witness.

(Record read.)

THE WITNESS: Well, the question was where and when. Where, of course, is at the regional office. When is according to our hearing calendar, and we do notify the claimant and advise him that if that is not convenient, then he should, or she, notify us and we'll set a different time.

MR. ERSPAMER: Q. I don't think you understood my [285] question. Let me rephrase it. The situation which I'm inquiring about is where a claimant requests a hearing. If I understand you correctly, it is not your practice to, in all instances in which a claimant requests a hearing, to honor that request, but rather, to review it, and the local adjudication office personnel decide whether or not the request will be granted?

A. Yes.

Q. And in your estimation, is that consistent with VAR 1103 and the Regulation 18.17 a.(1), which I read to you earlier?

MR. STOLL: Did you call it a regulation? I thought it was in the handbook.

MR. ERSPAMER: Excuse me. Yeah. It's M21-1, and it's, for the record, at Exhibit 17-50.

MR. STOLL: Which is, what?

MR. ERSPAMER: Which is 18.17 of M21-1 under a. And—

MR. STOLL: That's called a handbook or manual?

MR. ERSPAMER: Just a second. I'm not sure if that's the right. Excuse me. It was 18.18 at 17-151, where it states:

> "The due process requirements stated in VAR 1103 are for application throughout the adjudicative process. An integral part of the due process is the right of a claimant, upon request, to a hearing at any time on any issue involved in a claim within the purview of VAR's 1000 through 2899 inclusive."

[286] Is it your testimony that the local practice which you just described is consistent with M21-1, Section 18.18, which I just read to you?

A. We don't interpret that provision to require a formal scheduled hearing whenever the word "hearing" appears in correspondence. We exercise our judgment in determining whether a hearing would be appropriate at that particular time.

Q. And where in the regulations in the M21 or the other procedural rules and regulations does it give the local office the power to exercise its discretion on requests for hearings?

A. It's a matter of practice. We've never scheduled a hearing on viewing the word "hearing" in correspondence at any stage in the processing of the claim. If we did, ordinary claims processing would come to a halt. That's not true, because we don't really get many requests. But we try to be practical about it.

We would have complaints. We are not a formal or judicial court type of situation where if you asked for a hearing, I imagine, in a court case, you would be scheduled and you would have one hearing.

In our situation, you can have a hearing at any time on any issue. That's the basic rule. But that doesn't mean that we shouldn't exercise our judgment in protecting the claimant against his own lack of knowledge.

I keep repeating, why give a hearing if we're going to make a grant. Or there is a situation where we have made a [287] decision and we have a notice of disagreement with a request for a hearing, there is no point in proceeding immediately with that hearing before we issue the statement of the case.

It's our practice to issue the statement of the case and then grant the hearing. If we did otherwise, we'd have two hearings. And the same material, the same testimony would appear at both hearings. It would be repetitious for us and the claimant. It's not in the claimant's best interests.

Q. So I take it you can point to no authority in the VA rules and regulations which gives you discretion to deny a request for a hearing?

A. Not specifically. It would depend on the definition of "a request for a hearing."

Q. Well, I'm asking you to assume that a request had been made for a hearing. Can you point to any authority which gives you discretion to deny that—or defer that request for a hearing?

A. We can't deny it or ignore it. There's nothing that says we can't defer it to a more appropriate time in the best interests in the claimant, which is after the statement of the case, which gives him the factual situation as we interpret it with the rules and regulations, so that he can prepare himself for a hearing.

Q. That was not my question. I didn't ask whether there was anything that said you couldn't defer it. My question is: Is there anything you can point to in any VA policy manual, procedural manual, regulation or so on, which gives you authority to defer it or to deny a request for a hearing?

[288] A. There's nothing that vies us authority to deny it. There's nothing specifically that addresses a question of

deferring it. But a defferal is not a denial. There's nothing that says, as you might have it, that when we get a request for a hearing, we will stop all other claims activity, schedule a hearing immediately, and do nothing else until the hearing is completed.

Q. So you interpret the regulation which provides that the hearing is—Excuse me—the claimant is entitled to a hearing at any time on any issue involved in the claim to allow you to defer that request for a hearing to a later stage in the process?

* * * * *

THE WITNESS: In effect, because we don't interpret it as an instruction to drop everything and schedule the hearing immediately.

* * * * *

[289] Q. So by your answer, I take it you—it's your testimony that the claimant who—whose claim is initially denied and who requests a hearing after the denial and after the—Excuse me—is furnished a hearing after the statement of the case is prepared is in just as good a position as if he had had a hearing prior to the time the initial decision was made? Is that your testimony?

A. I didn't say that he was necessarily in as good a position. It would depend on the facts in the case.

* * * * *

[292] Q. And what is a due process situation?

A. A due process situation is where you have information from a third party, generally, that suggests that the benefit is being paid improperly, that the person has no entitlement or has reduced entitlement. And we give the person a due process notice before we take our actions.

We advise the person of our proposed action, allow him 60 days or 30 days to respond, and advise him that he can have a hearing. In that situation, in no way do we discourage that hearing before the expiration of the due process period.

Q. Okay. That would involve cases of, for instance, severence?

A. Yes.

Q. And it would involve cases of reduction?

[293] A. Yes.

* * * * *

[299] [Q.] Do you have a place where you keep copies of all the informal directives that you circulate locally, such as the document that was marked as 17-137 through 17-138?

A. No.

Q. Is there any requirement in the VA that you furnish copies of such directives to the Compensation and Pension Service in the central office?

A. I don't make a practice of preparing such informal notes. If there is anything that I want to be controlling and binding and authoritative, I issue an adjudication memorandum.

Q. What is an adjudication memorandum?

A. It's an expansion of a rule to cover a more particular situation. That's roughly what it is.

Q. Can it be an expansion of a circular, for example?

A. Well, if there's a particular situation that is not covered by any of the many directives we have and it is a problem, then I will expand on it in that format. I'm not saying that particular paper that you have is unique, but it's not far from being unique.

* * * * *

[303] Q. Now, the next series of questions is going to relate to record purpose disallowances where there's been a failure to prosecute a claim.

And first of all, can you explain under what [304] circumstances there would be a record purpose disallowance for failure to prosecute a claim?

A. This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request.

* * * * *

Q. And it's true, is it not, under the procedures you employ, in the absence of an inquiry, the claimant will not be notified of a record purpose disallowance except where the action is taken because of a failure to report for examination?

A. That's right.

Q. So in most circumstances, the claimant does not become aware that there has been a record purpose disallowance?

A. It's an administrative procedure of little significance. The person is aware that they didn't answer our request for evidence.

* * * * *

[305] THE WITNESS: They're not aware that they have taken the administrative step of removing the control from the file and taking—and that we took our end product. In other words, we got credit under the work measurement system as measured in AMIS, the Automated Management Information System, that we did work on the case that should be credited against our manpower resources to arrive at a productivity figure.

* * * * *

[306] Q. Now, in the case of a record purpose disallowance where the claimant has not furnished information for a year, if he were to re-open his claim, he would not be entitled to accrued benefits back to the date he originally filed the claim that resulted in the record purpose disallowance, correct?

A. If the year has acquired from the date of request, there is no accrued benefit for that period. Should he later establish his claim, it would be from date of receipt of the evidence.

* * * * *

[307] Q. And I take it a claimant can appeal a record purpose disallowance to the Board of Veterans Appeals as a procedural question, or is that precluded?

A. They're unaware of the record purpose disallowance, so there's no opportunity to appeal. All they have to do is reply to request for evidence.

Q. Within one year, and if they don't—what—what about the situation, one year or six months later they provide the information?

A. The request for evidence contains information that they'd have a year to present it. After that year, it would be date of receipt of the evidence. Now, they can appeal

our decision that the benefit may be paid only from the date of receipt of the evidence. They may appeal that. Whether they prevail or not is something else.

Q. Have you ever known of an appeal on that question to be granted?

A. No.

* * * * *

[311] Q. And in the case where a notice of disagreement is not received within one year of the letter of notification of the initial review or determination, under M21-1, the claimant will be informed that the action taken by the agency of original jurisdiction became final at the expiration of that one-year period, correct?

A. We don't notify them that the decision is final without some new inquiry. The original decision tells them that with a passage of a year, the decision becomes final, but after that year has elapsed, we don't write them a letter and tell them now our decision of such and such is final.

* * * * *

[316] Q. And again, you make no effort to go behind the DNA report?

A. We really wouldn't know where to begin to look, is what it comes down to.

* * * * *

[317] MR. ERSPAMER: Q. Handing you what's been marked as Exhibit 84, can you identify that for the record as one of the DNA reports with regard to a test series that you referred to earlier in your testimony?

A. Yes.

Q. And is that the type of information you rely upon in [318] deciding ionizing radiation claims?

A. Partially. Not totally.

Q. Is that the DNA furnished material that you rely upon that you referred to?

A. Yes.

Q. And is a similar volume available for each of the various test programs; for example, Operation Crossroads and the other operations?

A. I believe so.

Q. And how recently were these volumes made available to the local offices of the VA?

A. We've had them about for a few years. Different ones came at different dates. This one's dated January '82. I would say in the past few years. There might have been earlier editions.

Q. And does the VA inform claimants of the availability of such material as a standard practice in the process of adjudication atomic radiation claims?

A. As a standard practice, no. If we rely on that particular booklet, then that would be cited in a statement of the case.

Q. But there would be no standard procedure to provide the claimant with a copy of it?

A. No.

Q. And is a complete set of these booklets such as Exhibit 84 available at the Compensation and Pension Service in Washington, D.C.?

A. I would imagine.

[319] Q. And is there a standard—Is it a standard procedure in radiation cases to inform the claimant of the availability of such material with respect to the test shot that the individual participated in?

A. No.

* * * * *

[326] Q. And can you, again, as you did with Exhibit 10, give us an approximation of how many appealable decisions were made during the period of time covered by the report that has been marked as Exhibit 85?

A. That would be the number 6,489.

Q. Appealable decisions?

A. Yes.

Q. So there were how many total hearings held, again?

A. Well, the heading of the page is missing. That's the problem. But I'm trying to make it out.

Q. How many due process hearings were held, the number that we just referred to a few moments ago?

A. Well, they should correspond with these same headings here, the work units—How many due process hearings?

Q. Yes.

A. 374.

Q. So if 374 hearings were held in 6,489 cases active?

A. Yes.

* * * * *

[328] Q. So of the 199 notices of disagreement you received during the period of time covered by this report, which is Exhibit 85, a number of those you would expect would have been abandoned and no substantive appeal would have been filed?

A. That's right.

* * * * *

[339] MR. ERSPAMER: I think it says—I think it covers just any situation where the claimant shows up at a hearing without a representative, is the way I understand it.

Q. Is that your understanding?

A. Yes.

Q. And how often, in your experience, does this occur?

A. I can't give you facts. I can't give you data on that.

Q. Well, can you give me—Is it frequently, seldomly, half the time?

A. Well, it's in proportion to the number of claimants who have no representative during the claims process. It's common.

* * * * *

[342] Q. Does that set forth the procedures and standards that the VA follows under paragraph 20.03 at 17-190 in the case of false or fraudulent evidence or suspected false or fraudulent evidence?

A. This is obsolete, actually. We now have a circular that we follow in domestid fraud cases.

Q. What circular is that?

A. 20-8230.

Q. Is it common to have a circular amend the M21-1 manual or replace it?

A. Yes.

* * * * *

[343] Q. Are you aware of the instance where a program guide superseded a provision in M21-1?

A. Well, it would do it on a temporary basis until they could revise M21-1 to incorporate the program guide or at least refer to it. But as we explained in the past, quite often, there will be directives pertinent to a particular point in some other book or pamphlet or something, and you have to have a cross index.

We were talking about the authority for requiring hearings after a statement of the case, and we were reviewing Chapter 18 and couldn't find it. But in the course of the afternoon, I found an authority in some other directive, namely, M21-2, paragraph 8.03, which says, quote, "It is normally set at a date," "it" being the hearing, "is normally set at a date after the statement of the case is furnished to the claimant," unquote. It doesn't give the reasoning, but it states the rule.

Q. Can I see that?

A. Yes.

Q. And M21-1, that's from the procedural manual?

A. That's a manual restricted to appeals procedures pretty [344] much.

Q. That refers to hearings on appeal, does it not? The caption is Hearings on Appeal, Section 1?

A. That's right.

Q. So in the case of hearings on appeal, it is normally set on a date after the statement of the case is furnished to the claimant; it is right?

A. That's correct.

Q. And is that referring to—Is this a manual that relates to the Board of Veterans Appeals?

A. Well, we have that manual locally, and it's two-fold. It supplements what we have in Chapter 18. That's the basic point that we have many directives. And it's a matter of knowing all of them that pertain to a particular point.

So it behooves one to keep a cross index. But they are one as binding as another.

Q. So a program guide does not necessarily take precedence over a circular, or vice versa?

A. I don't know—

Q. Is this a ranking, though?

A. Well, the ranking is more in terms of chronology. We go by the latest, the latest directive that's pertinent to the issue.

Q. And that could be in either a circular, a program guide, or a procedural manual or, what, a memorandum from you, I suppose, or from your office?

A. Yes. As I described my memoranda, they would be expansions of very narrow issues not fully covered in any [345] existing central office directive.

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VOLUME IV
DEPOSITION OF THOMAS V. VERRILL
JUNE 21, 1983
(CAPTION OMITTED)

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[414] * * * * *

MR. ERSPAMER: Q. Now, directing your attention to Exhibit 19-174 through 19-175, can you identify that document for the record?

A. The top is missing, but it's a memorandum that I issued regarding PTS.

Q. And that's your signature that appears on 19-175?

A. Yes.

[415] Q. Do you recall when that was issued?

A. I was looking for the date, but I can't read it. I can't be sure. I would say at least a year ago.

Q. And for what purpose did you issue this memorandum?

A. To give some guidance to the rating boards as to what they should be looking for in post-traumatic stress claims.

Q. And what did you refer to in preparing the memorandum?

A. We have a program guide on post-traumatic stress. It has been revised at least once. We have a circular on the subject. And those were the primary sources.

Q. Okay. Directing your attention to Exhibit 5-1 in the other volume there—

A. These aren't numbered.

Q. It's entitled, "Post-Traumatic Stress Disorder Ratings."

A. Yes.

Q. Is that the circular you just referred to on post-traumatic stress that you referred to in preparing the memorandum?

A. Well, I think that the circular post-dated the memorandum.

Q. Okay. Was there a prior version of the circular that you referred to?

A. No, not of this circular, but the program guide.

Q. And directing your attention 19-187, is that the program guide which you just referred to that you referred to, 19-187 through, looks like, 19-189?

A. Yes. That's the revised edition. Yes.

[416] Q. Now, referring to 19-174, paragraph 3b., particularly, the language, "The onset of PTS is a consequence of exposure to a life threatening stressor in line-of-duty," that's listed as a criteria for service connection, correct?

A. Yes.

Q. And compare that, if you will, to the program guide at 19-189, the first paragraph, where it states, "It is not intended, however, that a post-traumatic stress disorder must have its onset during combat." Do you see any inconsistency between the two?

A. No.

Q. And can you explain why?

A. Well, what I say in 3b. is that it's as a consequence of exposure to a life-threatening stressor, and this says that it must—"this" being the program guide—says that it—the onset is not limited to combat.

And then it goes on to say, "or similar life-threatening episodes." It's just saying that the onset is not exclusively in combat. It doesn't have to be only in combat, but any life-threatening episode. And that's exactly what I said. Life-threatening stressor.

Q. In the life of duty?

A. Well, "in the line of duty" just means that it doesn't involve misconduct, such as drunkenness or self-inflicted wounds.

Q. Okay. Referring to your paragraph 3c. at 19-175, which reads, "The absence of a pre-service personality disorder NP diagnosis are a convincing explanation of aggravation or [417] superimposition of PTS symptoms," can you explain the source of that?

A. The source of that is our experience with these claims. We have, in most cases—I shouldn't say "most," because I don't have statistics on it. But in many cases, we find that we have a pre-existing diagnosed, professionally diagnosed, pre-existing personality disorder.

And now there is appended to that a post-traumatic stress disorder. All we are asking for is a convincing explanation of aggravation or superimposition. In other words, we are asking the professional to account for the fact that there was diagnosed a personality disorder. And we want his explanation of how it is that the PTS represents an aggravation of that. It's either expressed as an aggravation or a superimposition.

Q. Now, with respect to 3e. at the bottom of the page, which reads, "No record of significant pre-stressor substance abuse, if present symptoms are substantially drug induced," do I take it by that to mean that the symptoms for post-traumatic stress syndrome occasionally mirror those that relate to drug abuse?

A. I don't know that a psychiatrist would say that, but in—all I can tell you is that in cases where we have a PTS diagnosis, we frequently have drug abuse, and from what we are able to discern from the record, the symptoms are attributable to the drug abuse.

Then we look through the record and determine if there was pre-service drug abuse or pre-stressor, as I say, [418] pre-stressor drug abuse, and determine whether one is a progression of the other.

We don't actually determine that. As I pointed out before, we have instituted here, in San Francisco, an NP review board. This is the type of question that would be referred to the NP review board. It's a complicating factor. There's many complicating factors in PTS cases.

Pre-service personality disorders, anti-social personalities, either pre, during, or following service, drug abuse and the residuals thereof, all tend to complicate the PTS diagnostic picture.

We have conflicting diagnoses in many cases. The psychiatrist will, at one point, describe PTS based pretty much on the personal history from the claimant, but at an earlier date or later date, even, we will have a hospital report or a report from another psychiatrist explaining that the problem is an anti-social personality.

In order to help us resolve, or we use the phrase, "reconcile" diagnoses, we set up this NP review board in San

Francisco. We're no longer making judgements. The only judgment we make is to submit it to the NP review board.

Q. And what does NP stand for?

A. Neuropsychiatric.

Q. Now, it's true, is it not, that it's very difficult in cases where there has been exposure to a stressor in service and substance—Excuse me—substance abuse, to tell which one followed from the other; in other words, whether or not the stressor caused the person to start to use drugs or [419] whether the drugs caused the condition associated with the stressor?

A. It's difficult when you lack any facts on the subject. Commonly, we don't have. We just have the stressor followed by drug abuse. And in those cases, we invoke a reasonable doubt doctrine. We may not even have to do that.

But in cases where we contest the PTS diagnosis, if you will, we do have evidence that something did pre-exist the stressor, that there was drug abuse prior to the stressor, that there were personality problems prior to the stressor. It's only where we have specific evidence of some complicating factor prior to the stressor that we challenge these diagnoses.

Q. And would you agree with the statement that it's more difficult for a claimant to prevail on a PTSS claim where there has been a history of drug abuse?

A. If the history precedes the stressor, yes, it's going to be more difficult to prevail, but it comes down to a resolution of doubt by the professional NP review board.

By the way, this particular exhibit, the handwritten exhibit regarding hearing, has been superseded by later material.

Q. You have sent out a memorandum that revokes this particular exhibit?

A. Well, you asked the same question in relationship to the hand-printed comments I made on the hearings, and the point is that where something is not formalized as an adjudication memorandum, we don't formally rescind it. In the case of the [420] hearing notes, they apparently were never published, so I couldn't rescind them.

In this situation, we have not an adjudication memorandum, as such, but a memorandum. There's a difference between an adjudication memorandum and a memorandum. This type of product would be understood to be superseded by something of a later date.

As I testified Friday, in deciding what to go by in all the many directives we have, the common recourse is the item of the latest date. There is something of a later date here that guides the rating board through the process of resolving a PTS claim.

This particular memo was written before we had an NP review board, and there was little to guide the rating specialists in situations where we had the complicating factors. The material produced by centra! office doesn't really get into the particulars that the rating boards were encountering. It doesn't discuss complicating factors at all, and yet we were running into them all the time.

When you get into drug abuse, it's very difficult, where you have a history of drug abuse before the stressor, as we had in many cases, with drug abuse thereafter, to determine whether the drug abuse was in any way intensified by the stressor or whether the person is just reinforcing an old habit.

Q. Well, what directive or other document replaced this? What is the more recent document you referred to?

A. There is one that was produced in cooperation with me by [421] a section chief that is later.

Q. Do you know what it's entitled?

A. Well, it would have the same title, I believe, or similar title.

Q. Now—

A. It might not have been in the material that you found in my manuals. I don't pretended to keep those manuals complete and current with respect to material other than the printed material in the manual. And I have a memorandum, as I was saying, that's of a later date that is now being used by the rating board for PTS cases.

Q. Do you have a file that you keep memorandums of that type in?

A. We were discussing, again, the other day, whether there are files for informal memos, and I stated that only where they're typed now. There would be a copy of that in a binder that we label Adjudication Memos. I would expect to find it there. I can't guarantee that I would find it there, but I would expect to find it there. I have a copy, in any event.

Q. Would it be possible for you to produce the Adjudication Memos binder?

A. Yes.

* * * * *

[431] Q. I'm going to hand you 38 CFR, Section 3.102, which governs reasonable doubt, and ask you to compare it, if you would, to Plaintiffs' Exhibit 5, which is a DVB circular, regarding post-traumatic stress, and particularly to the Paragraph 3, which we discussed earlier.

And I'm going to read you a particular section. You can go ahead after I read it and read the whole thing if you want to.

> "The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat or similarly strenuous conditions and is consistent with the probable results of such known hardships."

Do you see any inconsistency with Paragraph 3, which states:

> "A history of a stressor as related [432] by the veteran is, in itself, insufficient. Service records must show the veteran was wounded as a result of any enemy action."

And so on. Do you see any inconsistency between that and the section of 3.102 that I just read to you? It's on the last page, second page, near the end.

A. Well, as I review the entire circular, the statement in Paragraph 3 must be supplemented by the statement in paragraph 1.a.(2), which says that objective evidence of a stressor includes, but is not limited to, official service records.

As we apply this circular, what we mean by service records otherwise substantiating a stressor is evidence that, as I was stating that the person was in an organization that

was in a particular place at a particular time, as he relates, and that the probability of that type of situation is evident. That's about the extent of the application of that Paragraph 3.

* * * * *

[434] Q. Do you see any inconsistency between the two? You either see one or you don't see one.

A. We got it right here?

Q. Yeah. Go ahead and read them again if you want to.

A. On the surface, it's inconsistent.

Q. So if the regional office—And I'm asking you to assume this. If the regional office were to just strictly follow Paragraph 3 of the circular, they would not be following the regulation on reasonable doubt?

A. We might be doing someone an injustice in those rare cases where, as I said, there were no complicating factors, the person gives credible facts, which are supported by symptomatology that is obviously post-traumatic stress symptomatology, there's no intervening causes, but there's a total absence of substantitating personnel records.

And you are—Taking it a little bit further than that, you have a situation where personal personnel records don't show that the person was elsewhere but they don't show that he was there, either. You might, nevertheless, have someone who is legitimately suffering from PTS. If you adhered literally to that paragraph, you would be doing that individual an injustice.

* * * * *

[441] A. Well, as you can appreciate, the claims process is a very complicated process, and the claims examiner has no directions other than those that are printed and made available to him. He has no choice but to follow these directives for lack of any other instructions.

* * * * *

[442] Q. Well, below—below that at 19-287, we have a document [443] dated December 28th, 1964, which has the same title. And under that we have a document again with the same title dated February 10, 1966, which is at 19-289. And below that, there's another document, 19-290, with the same title, which is dated May 7th, 1969.

And that's all I see in the section of the manual dealing with management control, quality control, which is Section R, which starts on 19-282.

Is there something else besides this that is in effect?

A. I mentioned it earlier. M21-4.

Q. Oh, I see. So a whole separate manual has been developed?

A. Yes.

Q. That replaces this?

A. Yes. There's a note on the back page at 19-292. I wrote the word "Obsolete."

Q. Okay. That's the one that says, "S Operating Performance," right, that you wrote "Obsolete" on?

A. Where?

Q. Well, the very last page of the exhibit is the cover sheet for "S Operating Performance." That's a different section, isn't it?

A. Yes, but that "Obsolete" might have referred to the preceding. Can't be sure. I don't—All I know is I do not refer to Section R for quality management any longer.

Q. Can you turn, if you might, to 19-279, which is entitled, "Rating Practices and Procedures, Death."

A. Yes.

[444] Q. Can you explain to me what this is used for.

A. Well, it's an explanation of consideration that the rating board should apply in specific situations which are explained in the program guide. It explains the term, "contributory cause of death."

We don't require that a service-connected disability be the sole cause of death or the primary cause of death in order to grant service connection for death. We allow the service-connected problem to be a contributory cause. And then it gives specific situations.

Q. Do you know of any other place in the VA circulars, program guides, procedural manual, regulations, that govern the procedures to be followed in rating practices and procedures for death cases?

A. I think there is a chapter on the manual on death rating.

Q. And that would be in Exhibit 17?

A. I suppose. Let's see. Death ratings, Chapter 56.

Q. What page reference is that?

A. 17-502.

Q. So a claims examiner who is doing the work-up on a death case would refer not only to the program guide chapter we just referred to, but the procedural manual as well, at 17-502?

A. A rating specialist would. These are rating questions.

Q. So a claims examiner would not refer to the procedural guide or the program guide?

A. Not in the process of making the decision as to whether or not death was service connected. That's not his [445] jurisdiction.

Q. Well, what VA manuals does the claims examiner have desk side?

A. The last two words?

Q. Desk side. At his disposal, at his work site.

A. He has the entire M21-1, but the chapter on death benefits that he would refer to is an earlier chapter in the 30s. Let's see. Chapter 33 would be one of them. Chapter 31. There's a subsequent one, too. 37 is on accrued benefits following that. Those are the primary samples.

He may not—That person may not be able to explain who he's to report to.

* * * * *

MR. ERSPAMER: Q. Now, you might refer, if you would, to 17-322, which is in Exhibit 17, Part Two, about one-third of the way in.

A. What was the number again?

Q. 17-322.

A. Okay.

Q. And if you'd look, if you would, to paragraph 34.06, Death After Service, and particularly, small a.(2), Reasonable Probability. First of all, could you read that to yourself under (2) in parentheses, (a), (b) and (c).

[446] A. Yeah.

Q. Do (a), (b) and (c) define the circumstances under which a reasonable probability exists with respect to death, service-connected death?

A. It doesn't completely define it, no. It just means that where you have these factors, you will find a probability of relationship. It doesn't exclude finding a relationship in other situations.

Q. And is there anything in the text of the regulation—of the provision that—which one can point to to conclude that it doesn't include other ways of showing service-connected death? Do you understand my question? Is there anything you can point to in the regulation which says this is nonexclusive, in other words?

A. I can't cite anything at this moment. I knew that—I know for a fact that it's not exclusive. It's not meant to exclude other situations, but it—it's just a requirement that you will find a relationship in these situations.

It's very much similar to the program guide that you were referring to, M-1.

Q. And that was 19-284, I think, if I remember correctly?

A. No. That's quality control. I got it. 19-279.

Q. 279, right.

And do you see any inconsistency between the reasonable probability standards set forth in section 34.06, I guess it's a chapter, isn't it, Chapter 34.06, a.(2), and the reasonable doubt standard expressed in 38 CFR, Section 3, I believe it's 102, which I'll hand you?

[447] A. Well, if you interpret this as being the only situation in which you can find a relationship, a contributory cause of death, it would conflict. But it's not meant that way. It's just like the presumptive provisions of the law. They require a finding in those situations. They don't preclude a finding in other situations.

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VOLUME V
DEPOSITION OF THOMAS R. VERRILL
JULY 8, 1983
(CAPTION OMITTED)

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[462]

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A. Just what I said, that:

"Failure of the claimant to respond to the statement of the case if no response is received within the time provided above, generally 60 days, the case will be closed. The decision of that agency will constitute final administrative action. No control will be established to follow up on whether an appeal is subsequently filed. If response is subsequently received within the original appeal period, the appeal will be reactivated.

"Protest"—That's the next paragraph.

"Protest in cases administratively closed. If, after a case is closed, as provided above, a claimant files a substantive appeal from that decision, the claim will be referred to the BVA [463] for determination of jurisdiction regardless of the interval of time which may have elapsed from date of appealed decision."

And then they refer you to 18.01E,which restricts that application, in effect, to questions of clear and unmistakable error of fact or law. Appellate review will proceed if an appeal is presented from a finding of an originating agency that there was no error in a prior determination.

Q. So the reactivation of the appeal then would be limited to the case of clear and unmistakable error?

A. Well, they could—This suggests that they could protest the fact that the case had been administratively closed, and that, alone, would require review by the BVA, as they say, for determination of jurisdiction.

Q. All right. And that would be a review of the question of whether or not the procedures had been followed and closed in a case?

A. That's right.

Q. And apart from that, the only review is for clear and unmistakable error?

A. Well, the claimants don't use that phrase. That's our phrase. All they have to do is allege error of fact or law.

Q. And what does the standard of clear and unmistakable error mean to you?

A. It's an error that is obvious to any reasonable person.

* * * * *

[482] Q. Now, another thing that I've noticed in reviewing these files is that the one-year presumptive period is mentioned in almost every denial letter. In other words, they say something to the effect that—I'll give you an example—[483] that, "The problems you claim arising out of an Agent Orange exposure were not shown to have been manifested in service of one year after separation from service."

And we talked before in your previous deposition about misapplication of that presumptive period. Have you identified that as a problem with regard to Agent Orange cases where the Adjudication Division relies upon absence of manifestation within one year of service as a basis for denying an Agent Orange claim?

A. The Agent Orange claims are based on, in some cases, no disability whatsoever, and in other cases, on a range of disabilities that staggers the mind. And some of those disabilities would be appropriately denied under the presumptive regulation and some wouldn't be.

Chloracne itself, I don't imagine we would deny it on the basis of failure to show chloracne within a year from discharge. We discussed that, and I think I said something to the effect that it wasn't used much, and yet, in fact, it is used a lot.

But it's kind of a difficult concept to talk about. It's a convenient regulation to point to when you're making a denial in that it gives a neat reason for denial.

* * * * *

[484] Q. But you find, do you not, that adjudication employees often misunderstand the presumption? In other words, if there hasn't been something shown in the service records within one year of service, they use that as a basis for denying the claim rather than just as a basis for not applying the presumption?

A. Well, I'd be repeating what I said before. It's a convenient regulation to point to to deny a claim, and yet, in that very claim, if facts were developed showing the causal relationship to a present disability, well—Let's say, for example, the Center for Disease Control comes back and says that a particular disability, ingrown toenails—bad example but something like that—is due to Agent Orange, then where we haven't had a claim, whether or not they had shown it within the one-year period, they would be service connected. I guess we could say in some cases, the conclusion is correct regarding service connection, but the citation for the conclusion is inappropriate in that it suggests that there must be evidence within that one-year period.

Q. And what type of an error would you characterize that as being if it was misapplied to require evidence within the one-year period? Is that a substantive or procedural or a—I forgot the other category.

A. Judgmental.

Q. Judgmental.

A. I don't know if I can categorize that. It's misleading, perhaps, to the claimant in that he's going to be beating the woods for evidence within the year, and all he really needs [485] is a medical opinion that's acceptable to the VA, that whatever present disability he has is, in fact, a residual of Agent Orange exposure.

* * * * *

[510] Q. And you can confirm that. And you notice, if you would, in Exhibit 162 that Mr. Clay does not examine the witness but just turns it over, basically, to the local board?

A. Yes.

[511] Q. Is that common that that happens?

A. It does happen, yes.

* * * * *

[522] Q. Now, the two files you produced where you indicated you were impressed with the work product of attorneys in your earlier testimony, one related to an attorney by the name of J.M. Weisberg?

A. Yes.

Q. And another attorney by the name of Linda Dankman, D-a-n-k-m-a-n?

A. Yes.

Q. Can you explain why you were impressed with Mr. Weisberg'

A. He's the one who submitted the material from a radiologist or radiation expert in Berkeley, I believe, on the subject of the effects of low-level dosages and otherwise argued effectively at the hearing for a grant of service connection.

* * * * *

[523] MR. ERSPAMER: Q. And in the case of Linda Dankman, what impressed you about the way she handled her representation of the claimant?

A. Well, in that case, I think it was a matter of the brief she prepared. I don't recall Mr. Weisberg's brief so much as I do Ms. Dankman's brief. She went to a lot of trouble researching veterans rules, regulations, laws, and made an argument on as many grounds as she could possibly think of. Most of them were not germane, but she—she tried everything. And she obviously did a lot of research.

Again, it was a pro bono representation from a, in this case, I believe, a sincere conviction that an injustice had been done to her client in the past. We, in fact, in that situation, agreed with her, tried to undo the, as she saw it, the injustice, and did, to some extent, recover a benefit for [524] her client.

But she was not satisfied with what had been done locally. Appealed in the same thorough manner but did not prevail on appeal.

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VOLUME VI
DEPOSITION OF THOMAS R. VERRILL
JULY 11, 1983
(CAPTION OMITTED)

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[546] * * * * *

Q. Do you frequently get complaints from claimants about transcript problems?

A. No. As a matter of fact, we don't. I find this a rather difficult letter to read.

Q. And why is that?

A. Well, it just has so many dates in it. And it's hard to follow where things were at which point in time. It's partly from her confusion as to how the system works.

Q. The author's, you mean?

A. Yes.

Q. What parts of the letter illustrate that confusion?

A. Well, the first part he's talking about a transcript and the dates of the transcript and things crossing in the mail, and then he goes into the Board of Veterans Appeals docket and how that system works, and he thinks that we're misleading him because we hold the cases on the docket. It happens to be standard procedure.

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VOLUME I
DEPOSITION OF MAX R. WOODALL
JUNE 23, 1983
(CAPTION OMITTED)

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[3] * * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Could you please state your full name for the record.

A. Max R. Woodall.

Q. What does the R. stand for?

A. It's an initial only.

Q. What is your current position?

A. I am the director of Compensation and Pension Service for Department of Veterans Benefits, Veterans Administration.

* * * * *

[4] Q. So you've been in the Veterans Administration for 20 years?

A. Yes. Yes, I have.

Q. And you were in the L.A. office for approximately seven years?

A. About seven. Six something. Six plus.

Q. And of your 20 years in the VA, 18 have been spent at the regional office level, or 17?

A. 17, 17.

Q. And are you trained as a lawyer?

A. Yes. I'm not currently active. I've passed the bar. I'm admitted in Kansas. I went to Washburn University law [5] school in Topeka, Kansas.

Q. And do a number of the people that—number of the adjudication officers and adjudication personnel in the VA have legal training?

A. Yes. There's a number. I can't tell you exactly what the percentage is. It varies from station to station.

Q. And what about in the Compensation and Pension Service in Washington?

A. I have a high percentage of attorneys on my staff.

* * * * *

[14] Q. And I take it you would agree with me then that if someone—if a regional office adopted a policy not to provide a statement of the—Excuse me—a hearing except [15] after the statement of the case, that would be inconsistent with the section of the Code of Federal Regulations which I read to you a few moments ago which provides that a claimant is entitled to a hearing at any time on any issue?

A. That's true, but there is one other manual—and I—I'll give you that citation tomorrow. I think it's in M21-1—that does indicate to a reader that you could ask to have the hearing held after the statement of the case is completed.

* * * * *

Q. Now, the statement of the case stage in the procedure is after an initial decision has been reached by the regional office, is it not?

A. That's true, after the notice of disagreement has been received.

Q. And the notice of disagreement operates as a notice of appeal, basically?

[16] A. That's right. It starts the appellate process.

Q. And so at that stage in the process, the decision has already been reached, and in the instance where there's a notice of disagreement, obviously, the decision has been against the claimant in some way?

A. Well, at least a portion of the decision, you're right, has been adverse.

Q. And if there were such a policy of not providing a hearing prior to the statement of the case, that would preclude the right to a hearing at what is the most meaningful stage in the adjudication process; in other words, prior to the time a decision has been reached, would it not?

A. That's true.

* * * * *

[24] Q. And have you become aware that at the regional office level, adjudication officers occasionally issue informal memoranda?

A. Well, it's—It's not authorized. Yes. I'm aware of two or three instances where they have operated with informal memoranda.

We insist, though—In memoranda, we do not consider that a promulgated memorandum. It must be published and it should have the appropriate number on it. It should have a sequence number and date.

Q. Are you referring to the standards for an adjudication memorandum such as we referred to earlier?

A. That's correct. Yes.

Q. And should be—For instance, handing you Exhibit 89-4, that's an example of an adjudication memorandum?

A. Yes. That's correct. They use the 21 to symbolize the service it comes from. 20 represents adjudication. In this case, they're using the middle two numbers to show the year, '82 for the year.

Q. And you stated that informal memorandum were not authorized. Can you expand on that a little bit—

A. Yes.

Q. —as to the reasons for that, and so on.

A. Yes. Very simply, if you're giving directions to [25] someone and those section chiefs are responsible for that particular area of quality, that directive should be in writing. There should be no question in anyone's mind as to what someone said or didn't say about something this important. We do insist—And if we found an informal directive, we would make that a note of our interview with the director.

Q. Can you describe the instances in which you have found informal memoranda that you referred to a few moments ago, four or five instances.

A. Yes. Well, we found one at—for example, at Honolulu, was what I was telling you about, that they were accepting a notarized document, and we wrote a letter to the adjudication officer.

Q. Okay. Putting that one aside, any others?

A. Yes. We found one just recently in Alaska where they were improperly waiving some cases concerning the—the thousand dollar payment from the State of Alaska. And we recommended that they follow the appropriate regulations and make proper determination.

Q. Any others?

A. Not recently.

Q. So you've never become aware of an informal memoranda from Mr. Verrill to his section chiefs regarding a provision for hearings before the statement of the case?

A. No, not really.

Q. And if such an informal memoranda exists, it would be improper, according to the rules and regulations that you've [26] set down for the Compensation and Pension Service?

A. Yes. Well, let me ask you exactly. Was there such a memorandum issued?

Q. Well, if you'd like, I can show it to you.

A. You made a statement there that no—I understand—There was a letter brought to my attention.

Q. Handing you what's been marked as 17-137 and 17-138, have you ever seen the original or a copy of this before?

A. I have seen the original of this.

Q. And in what connection did you see it?

A. Mr. Verrill showed it to me.

Q And when did he show it to you?

A. He showed it to me today.

Q. Okay. So that was another subject you discussed today, was this particular letter?

A. Yes, it was.

Q. And what did Mr. Verrill have—How did he introduce the subject?

A. He said that apparently, this had been made up by him at his desk. He was talking with his section chiefs, and I don't know why he did it in this particular format, and he did not explain to me why it was not reduced in writing.

But he said he did not—he did not feel it was even promulgated, and it was kind of, as you would say, an informal memo.

I did not have a chance to discuss it with him any further than that. In fact, I thought it was improper where I was coming over to talk with you. I wanted to talk with my [27] staff tomorrow about the question on M1-1 and exactly what kind of problems we may have out in the field.

But you made a comment about "no." Said "no"—I didn't read it that way, about issuing no statement of the case.

Q. Well, I believe it says, "Hearings are not to be scheduled before the statement of the case in all but the most unusual cases."

A. Okay.

Q. That's what I was referring to.

A. So he did leave. In other words, you made it sound like it was just—there was absolutely no hearing can be scheduled.

Q. I think I was referring there somewhat to his testimony in the deposition as well.

So if this had been distributed and I wanted you to assume it had been distributed to the section chiefs by Mr. Verrill in 1981, you would deem this to have been improper?

A. Yes, I would.

Q. And what else came up in your discussion with Mr. Verrill about this letter, this document?

A. Just the fact that we did discuss that the memos are supposed to be typed, dated, and have the number on them, and of course, signed, just like these. And that's what he understands an Adjudication Division memorandum should be.

Q. And did Mr. Verrill indicate to you that he was in any way worried about this particular document?

[28] A. We didn't really have that much time. The time was so short today that we—that we had almost no further discussion on that memo.

Q. Apart from the monitoring functions you described before when you occasionally send a team out to the regional offices, do you have any other mechanism in force by which you can discover or search for problems of this type; in other words, unauthorized memoranda or informal memoranda?

A. We have a checklist we give to our people, and we would be looking for a pattern there. Naturally, we're looking at the volume, for example, of hearings.

Why would the hearings be considerably lower, say, at San Francisco than another station. What bothers me most about this particular memo—And I can't remember exactly what that one sentence said now. Maybe it's the way you

responded to it. And I don't know what he said in his testimony.

This, to me, would tend to have a section chief go in a rather conservative direction as far as hearings are concerned. And we really—As far as I'm concerned, we need to leave the door open for hearings wherever possible. Wherever we can resolve a matter, we should still try to keep those resources available.

Q. And you started to refer to a section here that bothered you the most. What particular section are you talking about?

A. This one here. I guess the sentence—Apparently, the way you also interpret it. See, I didn't interpret it as closing a door. I thought that he just had an informal [29] discussion, and talking with these people saying that he had limited resources and probably trying to hold down what he apparently views as an excessive number of hearings. He's saying hearings are not to be scheduled before the statement of the case in all but the most unusual cases. That's rather restrictive.

Q. And inconsistent, is it not, with the Code of Federal Regulations?

A. Yes. And tomorrow I will be specific about that other manual. We need to discuss tomorrow as far as—We may have one more inconsistency.

Q. With regard to this letter, you mean?

A. Mm-hmm. That's true.

Q. And which provision would it affect?

A. As to whether you have to have a hearing before a statement of the case or should you try to get out the statement of the case first and then have the—a single hearing following the statement of the case.

* * * * *

[37] Q. Almost all of these that are listed here, the skin cancer, the brain tumors, the melanoma, the leukemias, the lymphomas, and so on, those all manifest themselves usually within a latency period longer than one year; isn't that correct?

A. Most—Yes. I think that's true.

Q. And have you run into a lot of instances—First of all, let me ask this: Have you run into any instances in which the—There is a presumption of service connection if certain types of diseases manifest themselves within one year of separation of service, right?

A. That's true. That's contained in Title 38.

Q. And have you run into any situation where a VA adjudication officer has misapplied that presumption so as to deny a claim based on the mere fact that it manifested itself [38] in excess of one year after separation from service?

A. Yes. We've had at least one or two—It's a rare error, but it has occurred.

Q. On what basis do you say it's a rare error?

A. I can't—I've only seen one or two of those in the two years I've been in Washington.

Q. What about when you were in St. Petersburg?

A. Yes. I've—I've seen at less one there, too. It's just a human error. They will overlook—The presumption is there. They're all trained on it. That's one of the things we constantly remind them of in the training.

* * * * *

[44] Q. Okay. And referring again to the Exhibit 61-4, where it [45] states, "There is no evidence of this condition in service or within one year of discharge," that would not be surprising for a cancer, would it, if there was no evidence of it within one year of service?

A. For most cancers, that's true.

Q. And if the—If the local rating board relied upon the absence of evidence, the condition in service or within one year of service in the case of a cancer or other disease with a latency period, that would be improper, would it not have been?

A. I would have to see the case, but it's possible, yes.

Q. Well, I'm asking you to assume that it's a—a cancer with a latency period.

A. Okay. Yes.

Q. If they relied upon that to deny the case, that fact that it—

A. With an extended latency period, yes.

Q. Just so the record is clear, with a cancer with an extended latency. If a regional office, in adjudicating a cancer claim with regard to a cancer that has a long latency period, relied upon the fact that it did not manifest itself within one year of service, that would have been improper, correct?

A. Yes. I think they should have developed it. I'm assuming it's somewhere within reasonable time frames. Now, we're not talking about somebody that was exposed back, say, on the original Atoll Test in 1945.

Q. Well, some cancers have latency periods of as long as 30 [46] years, do they not?

A. That's true.

Q. And that would take you back to the Atoll period, would it not?

A. Well, almost.

Q. Close to it.

A. Yeah.

* * * * *

[48] Q. I'm going to ask you a few questions about another exhibit, and I'll find it, first of all, and hand it to you. It's Exhibit 9, which is a document which relates to the credit, time credit for different functions at the local office which we had marked in Mr. Verrill's deposition. And tell me whether you recognize that.

A. This is the measurement that's given for a particular end product which encompasses all of the portions of that consideration. For example, on the first line, it has, 110, end product for initial compensation. We have a total of 2.84 hours, and 1.27 is for the rating board, 1.27 for authorization, 0.04 for input, and 0.26 for files.

Q. And that represents the objective or goal for the processing—the time for processing such a claim?

A. Yes. that's right. The processing of that claim is approximately that—worth that much in standard man hours.

Q. And the—The claims examiners are reviewed, in part, based upon their ability to satisfy that criteria for time expended on a claim; isn't that correct?

A. I'm sure a portion of their evaluation, yes, must be based on production of end product.

Q. And in your opinion, is 2.84 hours a sufficient period of time to properly develop an initial compensation claim and to do all the things you discussed you had to do to develop a claim?

A. On a difficult claim, it's not, but on an average basis—I was a member of a group that reviewed the work [49] measurement system about two years ago. Yes. On an average basis, it's—it's probably quite accurate.

Q. Okay. Is it a—If I understand you correctly, you're saying as an average of a time actually expended, it's accurate?

A. Yeah. I'm saying that as an average, if you looked at an—over an extended period of time at a number of 110s and if you looked at the simple ones and the complex ones and the MS cases, multiple sclerosis, and the radiation, they will average out to something approximately in there.

Q. And if I understand you correctly, 2.84 hours, in your opinion, is an inadequate amount of time in a complex case such as a radiation case?

A. Yes. In a complex case, you necessarily are going to make up for the easier ones. A complex case could easily take a half a day just to review the folder.

Q. And what happens to the claims examiner who gets a number of complex cases? His incentive is to handle them rather quickly, is it not?

A. I'd hope not. They're under—They understand that they're going to be measured over generally a six-month period. So I would think most of the—most rating specialists would understand that the averages will work out over an extended period of time.

But in one week you could get two tough cases that we'll say the case takes three hours just to go through it and review it and dictate it. Then necessarily, you couldn't have two or three weeks like that and measure that person for [50] a very short period of time, like one month.

It's a valid process if you give it enough time to work, but it must take probably more than a quarter. It would take several months for it to be valid.

Q. So if I understand you correctly, you do believe that 2.84 hours is a sufficient amount of time for the average case to devvelop?

A. Yes.

Q. And what is, in your opinion, the minimum adequate workup of a disability or death compensation claim—

A. Well, you can have—

Q. —that ought to be accomplished in those 2.84 hours?

A. You mean like how many a day? I don't think I understand your question.

Q. No. What types of things ought the claims examiner to do at a minimum in those 2.84 hours to develop a claim?

A. Okay. Well, let me clarify, first of all, that the claims examiner I think I'd be talking about is the rating specialist, the GS-12 type.

Oh, the first thing they would necessarily have to assure themselves of is that they have the proper evidence of service in there and that they do have an adequate supply of medical and service medical records. Are there anything missing. They would have to assure themselves that they have a fairly complete record.

And then they necessarily, in probably consulting with the doctor, would determine whether the diagnosis given to them by the examining physician. And I can't really stress [51] that too much, because remember, they cannot make a diagnosis. The board themselves are prohibited from furnishing a diagnosis.

So that examining physician or treating physician gives them the diagnosis. Then they're going to determine, as you said, go to some other source if they have a problem, or go back to thehospital and decide whether they need a differential diagnosis. That's why I still think that locally, they must have some type of resources to resolve these questions, because that is one of the most important parts of making that determination. Do we have the right diagnosis and do we have the proper evidence to support it.

Then they would also go to the rating schedule and assign what would be the proper percentage for the loss of earning capacity of the average person.

Q. Anything else you think would be the minimum workup that the rating specialist ought to do?

A. Well, that, and of course, the dictating of the rating itself. That's—

Q. Now, that 110 code, that refers more than to just the rating process?

A. Yes. Remember, 110 is going to take in a lot of things. That's the difficult case where the exam has at least one thing missing in it. So you're going to try to move the case along. Sometimes it will be nothing more than a phone call, and you call a doctor and say, "Hey, I think you forgot something here. Let's talk about one of our, you know, leukemia cases." A question comes up that's to a statement [52] in there or a workup on an NP, a stressor, delayed stress. The stressor is not clearly identified.

You try to move the case. So you facilitate it by calling him and saying, "How about if I send it back to you, Doctor, with a note in here. Will you try to clarify this or bring him in for another examination?"

That would be, I would say, an important part of that rating specialist's initial workup.

Q. What I was trying to clarify is that the 2.84 hours listed there includes not only the time of the rating specialist, but includes time of the claims examiner and the case clerk and all these other people?

A. Oh, yes. The 2.84 includes, as you see, includes an equal amount—When it gets out to the authorization section, the adjudicator is going to have to introduce it into the record, it has to be reviewed by the authorizer, and before it ever got to the rating board, your development clerk had to review it. Before it came to the development clerk, they had to build a folder, they had to do the other things to make sure they had a veteran, for example.

Yes. There's a lot of pieces go into it.

Q. Right. And so the 2.84 hours—The rating board couldn't average 2.84 hours. It has to be an average of the whole process?

A. That's right.

Q. And you don't see, if I understand you correctly, incentive on the part of the people involved in the rating

process or the development process to work quickly, [53] given the fact that they are being reviewed, in part, based upon their efficiency in satisfying that criteria?

A. Well, we tried to weigh the two things very carefully, and we—we have not set hard, firm standards at central office. We have given them some guidelines, and they—it has always been told to them that these are to be used as guidelines only. Then they set local standards.

But they also have to meet the quality standards. So locally—For example, Mr. Verrill here is going to have to waive his staffing—his resources, his staffing needs, his training needs, and what his perceived quality is.

Q. Okay. My question, though, is that you disagree with the statement that there is an incentive on the part of the claims examiners, the people adjudicating claims, to handle the claims quickly in order to satisfy this time criteria which is set forth in Exhibit 9?

A. That's right, because if they do that quickly and they cut some of corner, you're going to catch them on the quality review.

Q. Well, not every case is reviewed for quality?

A. That's true. I don't—I wouldn't call it an incentive. I guess if somebody wanted to, you know, as you say, beat the system, they could move some cases and make themselves look better than what they really are. But I think we're generally, at this level, dealing with professional people that are motivated, and I have not seen any—any pattern like this in the country.

* * * * *

[54] Q. And it's correct, is it not, that correspondence does not get any credit in this particular system?

A. When you're talking about correspondence, do you mean the—

Q. 400. The 400 category.

A. That's true. No. There's a—There's a presumption—There's an allowance in that 2.84. I'd have to check with Mr. Nixon as to what percentage of that is already loaded in to take care of ordinary correspondence activity.

Q. Now, I'm going to hand you Exhibit H to the Complaint and ask you to take a look at that, and I realizing it's

[55] probably a document you've never seen before. But just for background, Mr. Reason Warehime is also a plaintiff in this case. And for the record, this is an undated document, but it's Exhibit H to the Complaint from T.A. Verrill to Mr. Warehime.

* * * * *

Q. In your position as director of the Compensation and Pension Service, do you find anything misleading or inaccurate about Exhibit H?

A. Oh, it's not really inaccurate. I could see his point that he's got a backlog here. And I would say it could be more helpful if it was phrased in a different manner, more open to the claimants.

Q. You don't see anything improper about Exhibit H then?

A. I would want our adjudication officers to be more helpful and follow what we used to say a couple of years ago, "May I help you," carry through with that type of an approach to it.

So maybe they could have said some of these things and stressed that to Mr. Warehime, that, still, as they tried to in the closing paragraph, that's the important thing here, is that they did leave him with an open door. And he could come in for the hearing.

Q. Yeah. But it says, does it not, "If we do not hear from you, we will assume you don't want a hearing," basically, is what it says, right, within 30 days?

A. That's true.

Q. Do you think that was proper?

A. Well, I think what you're thinking it should have said is, then why have a 30-day limitation when actually, he has—at least he has the one year—up to a one-year appeal period. I don't know what you said in here has an administrative control, which is apparently what this is based on. I don't know why, you see, set a particular limit, but—

Q. Well, that paragraph puts the onus on Mr. Warehime to again request a hearing, and if he doesn't do it within 30 days, it will result in a waiver of his right to a hearing, does it not?

A. No, he doesn't waive his right to a hearing. He can still come in and have a hearing again.

Q. Well, they say here, does it not, "If you do not respond within 30 days, we will certify your appeal to the Board of Veterans Appeal without further delay for a hearing," right?

A. Yeah.

Q. So they would just go up to the Board of Veterans Appeals if he didn't respond with 30 days, right?

A. That's true. In the VARMS system, the control would come up and it may not be absolutely within 30 days, but within a short period of time after that, it would go up.

* * * * *

[58] Q. And how do you view the—What is your view of the function that a hearing, a personal hearing, serves in the adjudication process?

A. I think it's an opportunity for the claimant and his or her representative to expand the record in any manner they see fit, whether it's just nothing more than to come in and introduce one more piece of evidence or to talk about their own special problems as they see the case. And it really should be as open as possible.

It's non-adversary, so we don't have to worry about formal rules of evidence, and in some cases, we do elicit testimony or we get a track on a piece of evidence that will result in a grant of service connection. I think it's an important took in the adjudication process, and that's why I feel that letters like the one we just looked at s. ould only be used in very rare cases.

* * * * *

[60] Q. And again, in the area of appeals, appellate rights, I want you to assume for purposes of my question that approximately 30 percent of claimants who have filed a notice of disagreement do not follow through with their appeal by filing a substantive appeal. Do you have any explanation as to why that occurs, why 30 percent of the claimants abandon their appeal before it's even heard?

A. Well, in my experience, I've seen a high percentage, relatively high percentage, that, I think most people would agree, have very little merit in them.

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[64] Q. And can you explain to me the rationale for not informing a claimant when there's been a record purpose disallowance?

A. Well, in that one case we just talked about where you give them, we'll say, a sufficient number of days, 60 days, to respond, they would still have their one-year appeal period at some—You've got to have a reasonable point to move this thing along.

Now, you could still have, I guess, a follow-up and, say, remind them that your 60 days has expired, or 90 days has expired, and we do certain things. For example, in examinations, we are now instituting a control to remind them that that is a very important date for them and that that examination is set for them. And if they fail to appear for that, in fact, they could be running close to the one-year period after all this development has occurred.

Yes. We probably, in some cases, should consider notifying the person.

Q. Well, regardless of whether there's a—a rationale for bringing a case to a close at some point in time, can you explain for me the rationale for not informing the claimant whether that point has been reached? In other words, when the record purpose disallowance is entered, can you explain for me the rationale why the informant—claimant is not informed of the fact that the record purpose allowance has [65] been entered?

A. The only answer I have for that is that at this point, we have nothing in our system to—to trigger an automatic letter. It would require either a form letter or address the master records in such a fashion to let them know. And as far as I know, we have had no plans to change the program as to—as to this type of notification and trigger a letter when the administrative process is completed.

But I do not have a—

Q. You've got now—Can you justify the absence of such a notice? Just explain what justification, if any, you have for that.

A. Well, it would be very similar to the notice that you'd give a fellow attorney. You give them 30 days' notice

to complete a petition, and if they don't respond within that time, it is—further action taken or the case proceeds on, within a day or two, and at some point, you've got to be able to close the case. And I just don't see why we should have to send correspondence at every stage of the proceeding.

Q. And the effects of the policy of not sending the notice is that the record purpose disallowance is entered without the claimant's knowledge, is it not?

A. Yes, in—except if there's a running award. If there's monetary benefits running, they are told that the payments may be suspended or they are suspended for failure, for example, to report for an examination.

Q. And they know because the benefits are cut off?

A. Mm-hmm. That's true.

[66] Q. And the effect of that regulation is to make the time period set forth in the VA regulations and in the correspondence very significant to the claimant, is it not? In other words, if he fails to comply with them, he gets a record purpose disallowance?

A. That's right, but the claimant still has the ability to come in after that disallowance, as long as they come in within a one-year time period. They can still continue with their claim.

* * * * *

[69] Q. But the claimant is not notified of the fact, even if he doesn't provide the evidence requested within 60 days as requested in the letter, he still has up to one year to provide the additional evidence?

A. That's true. Yes.

Q. Now, in your opinion, what are the problems that veterans have faced in trying to prove up Agent Orange claims?

A. Well, with Agent Orange, it's mostly being able to show that the condition they have really is due to the—the dioxin that's contained in the sprayed material. They quite often will allege certain conditions that have occurred many, many—or not occurred, but have developed many years after their exposure over there. And we do have, in those cases, some success in being able to grant based on something that happened back during service.

For example, on—on some of the cases—We have two liver conditions, PCT, which have been granted, because there was something that was developed during service that indicated we have the acute condition. But PCT is a cyclical type—Actually, it's an acute condition, and it generally goes away within a few weeks or months, and those two cases at this point are not being—they're not receiving any money. They are being carried at zero percent disability.

The chloracne cases are probably of more concern right now than probably any other group because there are a great number of them, and some of them are not typical skin conditions, and they feel, I'm sure, very honestly, that it was due t the—whatever happened in their exposure over there.

But again, we simply do not have the weight. The medical evidence is not there. There are not enough experts that agree that these other conditions can be causally related to the Agent Orange exposure. For example, the birth defects. As I understand it, in talking with a couple of the doctors at the hearing this week, we—

Q. Are you talking about the hearing in Washington, D.C. where you testified?

A. Yes, yes. Well, I was there just to assist. Starbuck was the witness, Miss Starbuck.

They do not have sufficient medical agreement or evidence to show that there is really any statistical significance in the children of the veterans who have been over there and been exposed to Agent Orange.

[71] We conceded, as you know. If they've been there and been in a unit, we don't question the exposure itself. It's just evaluating the present medical evidence to determine whether it really can be related to that exposure.

Q. And it's true, is it not, that the vast majority—I believe all the Agent Orange claims have been denied because upon claim results of the Agent Orange claims have been denied based upon claim results of the Agent Orange exposure to date?

A. Let's see.

Q. If it helps you, I can refer you to another exhibit. You don't know the answer to the question, though, off the top of your head?

A. Well, you said that none had been granted?

Q. Yeah. None had been granted—Some had been granted for reasons other than Agent Orange, but none had been granted on the basis of Agent Orange; isn't that correct? And that's shown in Exhibit 4.

A. Right. The—The grants that are in here have been—

Is this the most recent one you have? This is last year's. That's '82.

Q. Is it?

A. November of '82.

Q. That's the most recent one we have, I think. That was produced to us. Do you have a more recent one there?

A. Yeah. I intended to have one. I hope to have it with me. I guess I didn't think we'd talk about that. Well—

* * * * *

THE WITNESS: Yeah. But as you have correctly pointed out, these have been denied in all these other cases because [72] we do not have that medical consensus that would connect the cases with exposure.

* * * * *

[75] Q. And in a lot of these complex cases, specifically, the radiation cases, the post-traumatic stress cases and the Agent Orange cases, experts are really indispensable to success of the claim, expert opinions, are they not?

A. Yeah, they could be. As I said, on Agent Orange cases, quite often, the condition itself, as I said, is poorly, or ill-defined, and you—you simply need help. And many times it will be a differential diagnosis that may resolve the problem.

* * * * *

[81] Q. But in the case of substantive appeal, it would be rare to get a document over two pages which contained a recitation of authorities, and so on?

A. Well, because generally, at that point, all you're doing—We have that document, the form called a 646 when you're getting ready to certify. Really, at that point, you're

supposed to have already reviewed it and you've made your argument beforehand.

So all you're doing is summarizing and making that last [82] statement that you reviewed this entirely and these are those, you know, that last summation of your case.

MR. ERSPAMER: I'll have the question read back. Move to strike the answer and nonresponsive.

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THE WITNESS: Generally, the documents—the statements are not over two pages, that's true.

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[82] Q. In your opinion, what are the justifications that exist in today's world for the fee limitation?

A. Okay. I'll—I'll list the conditions like this: First of all, we're trying to administer a program with the lowest possible administrative overhead, and generally, trying to deliver the correct benefit within a reasonably short time.

And we feel that our relationship with the claimants and the attorneys and service organizations, the way it's working right now, are just about optimum. And when I say "optimum," I think when you look at our problems in developing the medical records, running down the service records, and we're delivering original compensation benefits within approximately a hundred and some days, less than 110 days from the beginning to the day the first check is made, considering the development of the medical evidence and everything else, I think we're facilitating the claims just about as well as you could expect.

The other part—The other circumstance I'd like to add in concerns this hearing we've talked about today. What I like about the hearing is it's in a non-adversary situation. You're not bound, as I said earlier, by formal rules of evidence. We can take that case, like the ones we've been talking about today, the radiation case and the Agent Orange. We can look at other sources of evidence.

And I do feel strongly about this. I think most of the [84] regional offices try to find other sources of evidence or bases on which to grant benefits.

And I look at these books we're talking about today as guidelines that are not designed to just deny benefits.

They're guidelines to try to develop, and hopefully, pay, a fairly high percentage of the claims.

And I don't know how—If you add either rules of evidence or formal rule-making authority or additional judicial review or you have a higher salaried representative, you could do much better than the way it's going on.

And I really feel strongly about that this year because we've had several outside groups look at our—our programs, and they have found what they said was an acceptable level of quality.

And generally, as we found in the pension review last year, we have some problems in the system where we—we sometimes will have folks that don't report everything to us correctly, but we're generally delivering the right benefit. And under this procedure, we're doing it in a pretty good time frame.

And I guess that's—

Q. And I take it if the fee limitation were removed, it's your opinion that it would lengthen the administrative process.

A. Well, I think that—I'm not saying that attorneys are not facilitators, but I think when you get into the hearing itself, if you—if you make it an adversary hearing, if you have an attorney there, and it still, we'll say, it's not—[85] it's still a non-adversary, I don't see where it would make that much difference one way or the other whether it's an attorney or a well-trained service officer. I think some of the service officers are very well trained.

Q. Well, the Legal Services Corporation report concluded that there was very spotty quality among service officers. Would you disagree with that?

A. Yes, because that's a—that's a pretty strong statement.

Q. You do disagree with that?

A. Yes, I do.

Q. You haven't found uneven quality among service officers?

A. Oh, certainly. Yes. Yes. As a matter of fact, I know some service officers, yes have gone to other endeavors.

Q. Because of their incompetence?

A. Yes, or their—That's right. They either were not doing a very good job or they didn't feel comfortable there or—

Q. Well, you're not suggesting by your previous answer that formal rules of evidence would necessarily accompany the elimination of the fee limitation, are you?

A. No, not necessarily. No.

Q. And you're not suggesting by your answer that administrative overhead would be increased if the fee limitation were removed?

A. Well, maybe not significantly. I just think that we've got a—pretty much an open door, and the claimants generally should feel that they can come in and receive a [86] professional type of service from the organization, even including the veterans benefits counselor in the VA.

Q. Well, you're not saying that, let's say, atomic veterans, for example, thinking that they have an open door as far as their claims for disabilities and death, do you?

A. No. It's obvious, you know, that they're very concerned about, for example, their problems with DNA. They're not happy at all with it.

Q. And then the 99 percent of the atomic veteran claims whose claims have been denied are not—perhaps do not think that they have a, quote, "optimum relationship" in your term with the Veterans Administration, do they?

A. Well, but I still want to add in that you have a great number in there that also don't have a diagnosis. They're just—They're going on record in case something else—

Q. Well, 15—15 claims is not a very high number of claims that have been granted in the atomic radiation area, is it? There's a lot of people who are—who have filed claims who were denied who had a diagnosis, in other words?

A. Right. Now, remember, when you said 15 claims, there's a total of—there's another group over there in BVA that have been granted. It's not a great number, of course.

Q. How many is that?

A. I believe that's—Let's see. We've got 14 here, and I believe it's 15 over there. A total of 29.

Q. And that's not a very high percentage of claims, is it?

A. No.

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[92] Q. Do you personally see any advantages to introducing more attorneys into the system for representing claimants? In other words—

A. Well, I like the type of training. An attorney, of course, has an analytical type of mind. They have a—a logical approach. That type of training is useful, and I think that's what the service organizations are trying to do, is develop a—a person that can represent the veteran in that fashion.

* * * * *

Q. Are you distinguishing between a service officer and someone else?

[93] A. Well, I'm thinking about the possibility that some of these people might be just a volunteer at a county. They come in and—you know, a couple or three—but if they're working as a service officer, I do distinguish between a national service officer whose job—whose full-time job is do nothing but to assist in claims and develop evidence as contrasted to a—a county volunteer who just shows up as a kind of a member of the organization and helps once in awhile, makes a phone call or two.

That's the distinction I would draw. I don't see how we can provide that number of copies and keep them up on a regular basis. For example, on the CFR, if you're really going to have a service officer that would have all the tools to be able to represent the claimant, they should have—in addition to the CFR, they should have the manual, too.

Q. They should have the circulars?

A. Yeah.

Q. And they should have the directives?

A. Yeah. And that means you got to keep them up. Because, as you know, you've seen how many changes are already in the manual.

Q. And putting all this material together, the manuals, the directives, the circulars, CFR, and the other sources,

and in the local level, the adjudicative decisions, the local adjudication officer, it's quite a mass of material, is it not?

A. Yes. It's impressive.

Q. And it's difficult to cross reference material, is it [94] not, because some of the material is issued kind of willy-nilly?

A. That's one of the things I'm still working on is cross referencing. Yes. We're trying to do something where we have something like a citation system or really just a simple—like a key system, cross reference.

Q. And if I understand these circulars properly, the circulars are not issued on any regular basis with regard to any particular provisions, but they're just kind of issued where needed?

A. That's true.

Q. And circulars may modify or explain regulations, correct?

A. That's true.

Q. And they may modify or explain a program guide provision?

A. That's also true.

Q. And the same would be true with regard to an interim issue, modify or explain an interim issue?

A. Yes. An interim issue, of course, generally is something that is of short duration. For example, education. Things are in a transition phase so they issue an interim issue for a relatively short period of time.

Q. And it takes a considerable amount of time each year just to keep up a complete set of all these various sources of substantive and procedural delay as applied in veterans cases. Do you agree with that?

A. Well, it's not too bad. It's not like CCH or a Prentice-Hall tax system, but yes, the manual changes quite often, and as we discussed, and also the regulations.

Q. And can you explain to me your understanding of the purpose of service-connected death and disability compensation?

A. Okay. We'll take death first.

Q. Okay. Break it down. What is the purpose of death compensation?

A. Okay.

Q. Service-connected death.

A. Yeah. Service-connected death is to partially make up to that family for the loss of that veteran who would have been there for support, parental guidance, and so forth. It's—It's really a repayment for the loss of this member of the family. Compensation itself, the life compensation, is to make up for the loss of earnings capacity of an average person.

Q. What is that amount currently for service connection?

A. Well, on the hundred percent, of course, it's—it's over 1400 now.

Q. $1400 a month?

A. Right.

Q. I didn't want to interrupt you. I don't know if you were finished.

A. And that's also tax free. So there's a lot of people that don't understand the VA system, thinking that some of these people are overpaid. But remember, when you get up to a hundred percent veteran, you generally talk about a very seriously disabled veteran, and we are talking about the [96] average person. And the one they're generally complaining about is the person that has overcome the disabilities. Maybe a disarticulation of a major—

Q. Are you talking about the disabilities now rather than death?

A. Yeah. I'm talking about—

Q. I thought we were talking about death first.

A. Okay. Lets stay on—Okay. On death, that's a much lower rate of money, of course.

Q. The $1400 was a hundred percent disability?

A. Right. Oh, no. The other one—DIC is scaled by the—by the pay grade of the deceased person.

Q. By the what rate?

A. The pay grade, the relative ranking in service of the deceased veteran. And if it's a—you know, a death in service action. So naturally, the generals would get more money than, say, a sergeant.

Q. What is in a general range?

A. It's several hundred dollars, but it's nothing like the 1400. Let's see. Do you want me—I can get you a range on that tomorrow.

Q. Okay. That would be helpful. And so the disability, though, is by far the main?

A. Oh, by far. Yeah. The DIC is actually—

Q. The DIC is the death?

A. Yeah. DIC is death, and that's only 300 up to a few hundred. So it's just a nominal amount compared to the life compensation.

[97] There are other things in the death compensation, other benefits. The widow, for example, is also entitled to education benefits. She can go back to school. The children, if they're under age 23—If they're under age 26, actually, but generally, under age 23, they can receive counseling, they can also receive educational benefits.

Q. Again, this is limited to service connection?

A. That's right.

Q. Service-connected death?

A. Yeah. I'm staying just with service connection.

Q. That's what I want you to do. What about in the case of service-connected disability? What is the purpose of that particular program?

A. Okay. That program is to repay or make up for the lost earnings capacity of that veteran as measured by the average person. So the person that does have, say, a major disability for an amputation of a leg or an arm. Even though they may overcome that disability, we still pay them that compensation payment, irrespective of what they may have done to adjust or adapt, or, as I said, overcome the residual disability.

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Q. And what about other benefits to the family? Are the [98] same benefits available?

A. Yes. For the service—For the live case, we also have benefits for the wife and for the children, and on live benefits, we also have additional compensation available for the aid and attendance of another person. So actually, it can go over 2,000 a month if you have additional disabilities beyond the hundred percent.

* * * * *

Q. Is there service connection—There's no service-connected requirement in education?

A. No. No service-connected requirement on the, what we call, the Chapter 34, the straight education, but the second one, called vocational rehabilitation, is dependent on the service-connected disability.

Q. And so the—The straight education benefits are more like the non-service-connected disability program than they are like with the service-connected?

A. Flat rate—Yeah. It's more like that. And the service-connected education program has two other very important aspects that go with it.

It's keyed to the rehabilitation of that disabled person. So they also get counseling, they also get a, what we'd call, a specialist. They have an education specialist that works with them and helps them through their program, and they even have a revolving loan fund so that these people have more assistance in medical and in counseling areas than the others do.

* * * * *

[100] Q. And can you generalize as to the quality of the representation afforded by the attorneys in the cases that you saw?

A. Yes. It was generally very good.

Q. And can you expand on that at all? Good in what respects?

A. That they—Once they did assume—There was only one case that I remember where the attorney kind of dropped out as far as developing a fairly tough case. In the other cases, they were diligent, they—After they assumed control of the development of the case, they pursued it to its conclusion. And they weren't successful in every single case, but they did a good job of representing the person.

* * * * *

Q. And in your experience in St. Petersburg, did you ever see an attorney actually apply for the $10 fee that's allowed?

A. I can't recall—I think there was one, yeah.

Q. Do you recall the circumstances of that one application?

[101] A. It was a death case, as I remember, but I can't really remember the circumstances. It was quite awhile ago, seven years ago.

* * * * *

[104] [Q.] Now, a high percentage of claims that do go up to the Board of Veterans Appeals are remanded. And by "high," I mean roughly 15 percent. Isn't that correct?

A. Yes. That's true.

Q. And a high percentage of the remands are remands for further case development?

A. Yes. And sometimes it's nothing more, though, than a—an inadequate exam, or there's been something that's been overlooked. Occasionally, it may even be, as you mentioned about the hearings—there's a box on that certificate which tells BVA the person gets a chance to ask for a hearing before it goes up. Sometimes that's not completed. That could be remanded for something that simple.

[105] Q. And approximately 13 percent or so of the cases go up to the Board of Veterans Appeals are reversed outright; isn't that correct?

A. Yes. It's approximately that.

Q. So you're looking at a combined error rate of approximately 25 percent or higher?

A. Well—But remember, that 15 percent remand is—as I said, sometimes is—it's erroneous possibly in some cases where they should have re-examined before they sent it up. That's the one that will show up I guess as often as anything else I can think of. And yes, that would be—I guess—You're talking about an error. But it ultimately does not end up in any monetary change.

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[107] Q. Can you give me any instances that you're aware of of unscrupulous conduct by attorneys in the VA claims process setting?

A. No, not recently, no.

Q. Can you give any nonrecent examples?

A. You're saying attorneys versus—

Q. Just attorneys.

A. No, not attorneys, no.

* * * * *

[109] Q. Anybody. There's no procedure by which you can subpoena or request that a person—that such a person appear at a hearing, right?

A. That's what I understand.

Q. And what is the reason for that?

A. Well, I can think of a couple of good reasons. First of all, it would be very disruptive to the office. Some of these people are simply not prepared to handle an adversary confrontation with the claimant. They're a claims examiner that's doing nothing more than introducing information into the Target system, and I don't see where it would assist in the development or aid the claimant's case in most instances.

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[114] Q. In your view, has the reasonable doubt standard been followed in the atomic radiation cases?

A. Yes. The ones I reviewed. I think we've tried—Yeah. I know we're talking about a difficult area where there are many complex matters involved as far as developing the information and the evidence, but the ones I've seen that Mr. Macomber has been working on have had a diligent effort applied to them.

Q. And so I take it by the fact that 99 percent of those have been denied that the reasonable doubt cases you reviewed in the area of atomic veterans cases have involved denials, largely?

A. That's true.

Q. What, in your opinion, would be necessary in order to establish an atomic veteran radiation case under the reasonable doubt standard?

A. You would have to have something that would be—I [115] guess to give you a comparable to it, were talking about back earlier today, something where we were so close to a medical consensus that we have sufficient experts that can agree that there is a reasonable relationship, here that the etiology can be established.

That's what I think we're really looking for, to get these experts to agree that there's—and that list you and I talked about earlier.

Q. The program guide?

A. That's right, that there's some of those that we really can't agree.

Q. A lot of cases involving leukemia, which is one of the strongly associated categories, have been denied, have they not?

A. Yes. That's true.

Q. And there's a large volume of medical literature that supports the existence of a causal relationship between exposure to radiation and various cancers, is there not?

A. yes.

Q. Given those facts, what, in your opinion, more do the atomic radiation claimants have to do in order to satisfy that reasonable doubt standard?

A. We've got to have some expert that will agree. And I guess I'm really talking about somebody over there in the Department of Medicine and Surgery that will come forward and say, "This is one of those cases out of thousands that we can see the connection."

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[116] MR. ERSPAMER: Q. Are you referring to 38 CFR 3.326(d) where it states, "A statement from a private physician may be accepted for rating the pension claim of a veteran, widow, or widower, a claim for aid," and so on?

A. Yes, but not for compensation.

Q. And it doesn't say, "but not for compensation," does it?

A. Well, okay.

Q. Maybe that's something you can check on tomorrow. But is there nothing you can think of now besides that provision, 3.326(d)?

A. No.

Q. And let's assume for the moment that there is somewhere that states that private medical opinions cannot be relied on. What is the rationale for that, if it exists, either written or unwritten policy?

A. I don't really know on that one. It's a long-standing rule, and I don't know the rationale for it.

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